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In The

Supreme Court of the United States

October Term, 1992

DAVID CALHOUN, CHRISTINE CALHOUN, RONALD DALZELL, PHILIP RINEHARDT, and KEVIN MAY, in Their Individual Capacities,

Petitioners,

vs.

JOSEPH SENK and PATRICIA SENK,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

LEO R. WARD
Counsel of Record
ALAN E. JOHNSON
WARD & ASSOCIATES, A LEGAL PROFESSIONAL ASSOCIATION
The Dallas Building
2217 East Ninth Street
Cleveland, Ohio 44115
(216) 241-0515

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether evidence sufficient to create a genuine issue of fact under Rule 56 of the Federal Rules of Civil Procedure in a qualified immunity context includes evidence that is self-contradictory, unspecific, and/or implausible in light of the direct, probative, and admissible evidence of the record taken as a whole.

2. Whether, or to what extent, the principle of qualified immunity in *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), that "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense" applies to allegations that police officers used excessive force in violation of the Fourth Amendment and 42 U.S.C. § 1983.

3. Whether *Hunter v. Bryant*, 112 S.Ct. 534 (1991), requires the question of the objective reasonableness of individual police officers' use of force to be determined by the court on summary judgment where, considering the genuine, material evidence of record as a whole, the degree of force employed by the officers was reasonable, even if mistaken.

LIST OF PARTIES

All parties in the Sixth Circuit Court of Appeals proceeding are listed in the caption except Larry Felean, a police officer sued in his individual capacity. The Court of Appeals reversed the District Court's denial of qualified immunity to defendant Felean in his individual capacity.

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David Calhoun, Christine Calhoun, Ronald Dalzell ("Dalzell"), Philip Rinehardt ("Rinehardt"), and Kevin May ("May"), in their individual capacities, hereby petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

REPORTS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (App., *infra*, 1a-9a) is not reported. The order of the United States District Court for the Northern District of Ohio, denying petitioners' motion for summary judgment, (App., *infra*, 10a-26a) is not reported.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on April 22, 1992. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in pertinent part, that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . "

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof

> to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

STATEMENT OF THE CASE

Respondents filed this action on September 21, 1990 in the United States District Court for the Northern District of Ohio, Eastern Division. In their amended complaint, filed June 20, 1991, respondents alleged, *inter alia*, that petitioners, who are municipal police officers, used excessive and unreasonable force, in violation of the Fourth and Fourteenth Amendments and 42 U.S.C. § 1983, during the arrest of respondent Joseph Senk for domestic violence on May 12, 1990. Jurisdiction was invoked pursuant to 28 U.S.C. § 1343; jurisdiction is also properly predicated upon 28 U.S.C. § 1331. The petitioners filed a motion for summary judgment based upon the federal doctrine of qualified immunity. The District Court denied petitioners' motion for summary judgment, and the Sixth Circuit Court of Appeals affirmed the District Court's denial of qualified immunity to petitioners.[1]

In 1979, respondent Joseph Senk sustained a head injury in a work-related accident. As a result of this injury, Mr. Senk suffers from postconcussion syndrome, which in lay terms is a chemical imbalance in the brain whereby a portion of the brain remains in a concussion, resulting in wide-swinging personality changes and

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[1] The Court of Appeals reversed the District Court's denial of qualified immunity to another police officer, Larry Felean, as to respondents' claim that Officer Felean conducted an unlawful search of respondents' residence. Accordingly, Officer Felean is not a petitioner herein.

explosive personality outbursts. Joseph Senk experienced explosive rages during which he broke furniture and threw things. Joseph Senk testified at his deposition that "after the episode I would not remember; I would be just as much amazed as anybody else like what happened."

Respondent Joseph Senk was first diagnosed as having postconcussion syndrome in 1980 or 1981. Mr. Senk's physicians treated him with various medications for this condition; however, according to Joseph Senk's deposition testimony, his explosive episodes continued even when he was taking his prescribed medication.

Respondent Patricia Senk testified at her deposition that she did not learn until after she married Joseph Senk in 1980 that he suffered from postconcussion syndrome. On December 3, 1982, at 11:24 p.m., Village of Northfield police officers responded to a call from the Senk residence. Mrs. Senk told the officers that Mr. Senk had become very violent, that he had threatened to kill himself in front of Mrs. Senk and their children, and that he had threatened physical harm to her and her children. On August 29, 1985, Mrs. Senk signed a domestic violence complaint alleging that Mr. Senk had assaulted her minor son by repeatedly hitting him and shoving food down his throat; Mrs. Senk further stated that Mr. Senk "has also assaulted me many times before." On March 2, 1987, Mrs. Senk signed another domestic violence complaint, alleging that Mr. Senk "threw Mrs. Senk down, breaking the ribs on her left side." In her deposition, Mrs. Senk explained this episode as follows: "Joe was on some new medication, was doing pretty well, was seeing his doctor and he came home one night and was upset in the kitchen, threw his arms up and he shoved me."

On May 12, 1990, respondent Joseph Senk had another explosive outburst, during part of which he knocked over furniture in his kitchen and attacked respondent Patricia Senk. Mr. Senk's current neurologist, Dr. Brickel, later observed that this incident apparently involved another one of Mr. Senk's episodes of "explosive personality outbursts for which he has no recall", caused by his head injury on the job about ten years earlier. Respondent Patricia Senk testified at her deposition that "I know when Joe is going through a bad episode" and that, just before her husband attacked her on May 12, 1990, "I was trying to control it this time, to find out what was wrong."

It is the police response to respondent Joseph Senk's May 12, 1990 explosive outburst that is the subject of respondents' complaint and amended complaint.

Petitioner Dalzell, a police officer employed by the Village of Northfield, Ohio, was dispatched at the time of the May 12, 1990 incident to respondents' residence in response to a 911 emergency call. Officer Dalzell requested assistance from the Sagamore Hills police department, and petitioner David Calhoun responded to this request.

The two police officers arrived at the respondents' residence at about the same time and observed Patricia Senk sitting in her car. The driver's side window had been broken out and there was glass strewn about inside the vehicle. Joseph Senk told Officer David Calhoun that he and his wife had been fighting and that he had been drinking. Officer David Calhoun smelled alcoholic beverage on Mr. Senk's breath. The officers found that Patricia Senk had red marks on her neck and chin, indicating that she had been grabbed around the neck. Patricia Senk told

the officers that her husband had beaten her in the chest and abdomen, that he had attempted to choke her, and that she was having trouble breathing, had abdominal pains, and could taste blood in her mouth. She told the officers that she was tired of getting beaten up. She warned the officers that Joseph Senk was violent and would attempt to hurt them if placed under arrest.

The officers summoned a rescue squad for Patricia Senk. Meanwhile, Officer David Calhoun had escorted Joseph Senk to his patrol car. While a dispute exists as to whether Joseph Senk was handcuffed at that point, he offered no physical resistance. In addition, a Sagamore Hills police dispatcher sent petitioners Christine Calhoun, Rinehardt, and May to the scene. Patricia Senk requested that her eldest daughter be called to pick up the younger children. Officer David Calhoun entered the Senk residence to make that call. While doing so, he observed that a kitchen cabinet had been tipped over and its contents scattered about the floor.

Officer Dalzell asked Patricia Senk if she wanted to press charges against her husband. She said that she did. Officer Dalzell then went to the patrol car to inform Joseph Senk that he was going to be taken into custody for domestic violence.

Officer Dalzell testified at his deposition that when he went to inform Joseph Senk that he was under arrest for domestic violence, Joseph Senk responded that Officer Dalzell "had better draw [his] [expletive] gun and shoot him, it was the only way [Officer Dalzell] was going to keep [Joseph Senk] from killing [him]." Although Joseph Senk denies making that statement, and claims that he was simply yelling at the officers for entering his house and that Officer Dalzell told him to "shut his [expletive]

mouth", it is undisputed that Joseph Senk was yelling at the officers and that he violently thrashed about and kicked out the side window of the patrol car after his verbal exchange with Officer Dalzell.

Officers Dalzell and David Calhoun testified at their depositions that after Joseph Senk kicked out the patrol car window, he told David Calhoun that he was going to take his weapon and kill him, then reached outside the patrol car and grabbed Officer David Calhoun's gun belt, approximately two to three inches from his weapon, and pulled David Calhoun towards him. David Calhoun unsuccessfully tried to manually free Joseph Senk's grip on his belt by pushing Joseph Senk's arm away. When Joseph Senk would not release his grip on the belt and kept pulling, David Calhoun struck Joseph Senk across the forearm with his flashlight. Only then did Joseph Senk release his grip from the gun belt. David Calhoun then tried to push Joseph Senk back into the vehicle. Joseph Senk grabbed the exterior door handle and tried to open the door to the patrol car. David Calhoun and Dalzell forced the door closed with their bodies. Joseph Senk then grabbed Dalzell's gun belt approximately three to four inches from his weapon, and started to pull him into the patrol car. Dalzell also tried, unsuccessfully, to manually pull away and free himself from Joseph Senk's grip. In fear for his own safety and knowing that Joseph Senk had just tried to take David Calhoun's weapon, but lacking a defensive weapon to use to free himself, Dalzell simply punched Joseph Senk in the face. Joseph Senk then released his grip. Eyewitness Frank Guffin[2], who

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[2] Frank Guffin was named as a defendant in this action on an unrelated count alleging denial of proper medical care to

(Continued on following page)

was standing about fifty feet away, also observed Joseph Senk lunge at and grab onto the waist of one of the officers.

To rebut the aforesaid testimony that Joseph Senk verbally threatened the lives of petitioners David Calhoun and Dalzell and grabbed their gunbelts, the respondents relied upon a portion of the deposition testimony of witness Paul Testa ("Testa"). Mr. Testa confirmed that Joseph Senk did kick out the window of the patrol car and subsequently reached outside the broken window and tried to open the car door. However, Mr. Testa testified on direct examination that he never heard Joseph Senk threaten any police officer and never saw him grab onto any of the petitioners' gunbelts. On cross-examination, Testa explained why he was not able to hear the threats:

> Q. Okay. Now what was Joe [Senk] saying as he was coming out of the police cruiser, window, anything?
>
> A. I don't know. Everybody was saying stuff, you know, and I don't know.
>
> Q. Was he saying anything?
>
> A. I don't know.
>
> Q. Was it loud voices going back and forth?
>
> A. Yes.
>
> Q. A lot of commotion?
>
> A. Yes.

As to Mr. Testa's statement that he did not see Joseph Senk grab the officers' gunbelts, Mr. Testa admitted in his

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respondent Joseph Senk during transit to the hospital. Summary judgment was granted in favor of Mr. Guffin by the district court in a separate order.

deposition that he was not looking at Mr. Senk and the officers at all times during this sequence of events.

Respondents also presented an affidavit from Joseph Senk in which he stated that "at no time . . . did he threaten the life of any police officer, nor did he attempt to gain control of any gun or gun belt, and he did not punch or assault any officer in any manner." Joseph Senk made these assertions notwithstanding his prior testimony that he did not remember his actions after experiencing one of his explosive personality outbursts and notwithstanding that his own treating physician, Dr. Arthur Brickel, had concluded that Joseph Senk's actions on May 12, 1990 were apparently another one of his episodes of "explosive personality outbursts for which he has no recall."

The respondents also contested petitioners' testimony that petitioner David Calhoun struck Joseph Senk on the forearm and wrist with the flashlight, contending that David Calhoun struck Mr. Senk three times in the head with the flashlight. In support of their contentions, the plaintiffs relied upon an additional portion of Testa's deposition in which he states that one of the officers struck Joseph Senk three times on the head with a flashlight. The respondents' contentions that Joseph Senk was struck in the head three times with a flashlight is unsupported by the undisputed medical evidence proffered by the respondents. The medical evidence confirms that Joseph Senk had only a single laceration above his eyebrow that was between an inch and an inch and a half in length. Respondents did not provide the District Court with any medical evidence whatsoever supporting a second or third blow to Joseph Senk's head. Nor is there any

medical evidence that petitioners repeatedly punched Joseph Senk.

The third purported issue of fact related to the reasonableness of the force used by the petitioners. In this regard, the respondents made repeated references to alleged violations of "proper" police conduct or procedure, including "arrest technique and unarmed restraint," "abusive use of handcuffs," and "commonly employed techniques", all of which were to be demonstrated to the jury at trial. The respondents have not presented any evidence as to what these "techniques" and "procedures" were. More importantly, given that qualified immunity was asserted as a defense by the petitioners, the respondents did not present any caselaw that the *particular conduct* (under either the petitioners' *or* the respondents' version of the facts) clearly fell within an area protected by the Constitution, such that a reasonable officer would know that conduct violated the constitutional right.

This failure is perhaps most significant on the issue of whether petitioner Christine Calhoun violated Joseph Senk's rights by her alleged use of a nightstick to restrain him after, according to Testa, Joseph Senk broke the handcuffs that the petitioners were attempting to put on him.

The vast majority of the evidence presented by the respondents related to the conduct of petitioners David Calhoun and Dalzell. In their complaint and amended complaint, the respondents alleged that petitioners May and Rinehardt participated in the alleged beating of Joseph Senk with their nightsticks, flashlights, and fists. In their briefs, however, the respondents presented no evidence detailing May's or Rinehardt's involvement in the alleged beating.

It is upon the basis of these purported genuine issues of material fact that the District Court held that "granting [petitioners] qualified immunity would be inappropriate." Even so, the District Court concluded that the right to be free from excessive force is clearly established. The District Court, however, did not engage in any analysis as to whether, even under the specific circumstances of the *respondents'* version of the facts, the petitioners' conduct rose to such a degree of impropriety that any reasonable officer would have known that what the petitioners did violated Joseph Senk's right to be free from excessive force.

The United States Court of Appeals for the Sixth Circuit affirmed the District Court's denial of qualified immunity to petitioners, holding:

> Immunity would doubtless be appropriate here if it were undisputed that the facts were as claimed by the officers. If the Senks' version of the facts is correct, however, the [petitioners] would clearly not be entitled to qualified immunity. In this case, as in [*Brandenburg v. Cureton*, 882 F.2d 211, 216 (6th Cir. 1989)], "the legal question of qualified immunity is completely dependent upon which view of the facts is accepted by the jury." Summary judgment based on qualified immunity is therefore inappropriate.

As will be discussed more fully below, the Sixth Circuit's holding and analysis in this case raises important questions regarding federal summary judgment principles and federal qualified immunity principles. The Sixth Circuit opinion did not address the specific arguments in petitioners' appellate briefs that the evidence proffered by respondents to create a genuine issue of material fact was not, as a matter of law, "genuine"

within the meaning of this Court's decisions. Moreover, the Sixth Circuit did not properly apply the qualified immunity principles established by the Court. This case presents significant questions regarding the principles of summary judgment and qualified immunity in the context of claims of excessive force.

ARGUMENT

I. EVIDENCE SUFFICIENT TO CREATE A GENUINE ISSUE OF FACT UNDER RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE IN A QUALIFIED IMMUNITY CONTEXT DOES NOT INCLUDE EVIDENCE THAT IS SELF-CONTRADICTORY, UNSPECIFIC, AND/OR IMPLAUSIBLE IN LIGHT OF THE DIRECT, PROBATIVE, AND ADMISSIBLE EVIDENCE OF THE RECORD TAKEN AS A WHOLE.

Rule 56(c) of the Federal Rules of Civil Procedure provides, in pertinent part, that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no *genuine* issue as to any *material* fact and that the moving party is entitled to judgment as a matter of law." (Emphasis added.) Rule 56(e) provides, in pertinent part, that "[w]hen a motion for summary judgment is made and supported as provided in this rule, . . . the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth *specific facts* showing that there is a *genuine* issue for trial." (Emphasis added.)

The Court has elaborated upon the meaning of the above-quoted provisions of Rule 56 in three recent decisions: *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Matsushita*

Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). The summary judgment principles set forth in these cases and in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968) are directly applicable to the instant case.

The burden on the party moving for summary judgment "may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 323.

"By its very terms, [the Rule 56(c)] standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Liberty Lobby*, 477 U.S. at 247-48 (emphasis in original). "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. However, "[i]f the evidence is *merely colorable, Dombrowski v. Eastland*, 387 U.S. 82 (1967) (*per curiam*), or is *not significantly probative, Cities Service, supra*, at 290, summary judgment may be granted." *Liberty Lobby*, 477 U.S. at 249-50 (emphasis added). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

"When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the

material facts." *Matsushita*, 475 U.S. at 586 (footnote omitted). The "purpose of summary judgment is to 'pierce the pleadings and to *assess the proof* in order to see whether there is a genuine need for trial'. . . . " *Id.* at 587 (emphasis added) (quoting Advisory Committee Note to 1963 Amendment of Fed. R. Civ. P. 56(e), 28 U.S.C. App., p. 626). "Where *the record taken as a whole* could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Id.* (emphasis added) (quoting *Cities Service*, 391 U.S. at 289).

"It follows from these settled principles that if the *factual context* renders [the plaintiffs'] claims *implausible* – if the claim is one that simply makes *no . . . sense* – [plaintiffs] must come forward with *more persuasive evidence* to support their claims than would otherwise be necessary." *Matsushita*, 475 U.S. at 587 (emphasis added).

A plaintiff cannot rely on "the hope that something can be developed at trial in the way of evidence to support" the allegations of the complaint. *Cities Service*, 391 U.S. at 290. Rather, to prevent summary judgment, the plaintiff must produce "significantly probative" evidence supporting the elements of the claim at the summary judgment stage. *Id.* at 288, 290. Speculation, unreasonable inferences, and implausible factual scenarios are insufficient to defeat summary judgment, particularly when substantial evidence exists to the contrary. *Id.* at 280-90. Evidence produced by the nonmovant that is inconsistent with the nonmovant's theory constitutes especially compelling evidence supporting summary judgment. *Id.* at 277-79, 286.

The lower federal courts have also elaborated upon the concept of what constitutes a "genuine" issue of fact under Rule 56. "A *pretended issue*, one that *no substantial*

evidence can be offered to maintain, is not genuine." *Fireman's Mut. Ins. Co. v. Aponaug Mfg. Co.*, 149 F.2d 359, 362 (5th Cir. 1945) (emphasis added). Moreover, "[e]vidence that is *too incredible to be accepted by reasonable minds* does not raise an issue of credibility to defeat a motion for summary judgment." *Allstate Ins. Co. v. Cannon*, 644 F.Supp. 31, 33, 34 (E.D. Mich. 1986) (emphasis added). *A fortiori*, "[e]ven on a motion for summary judgment, a court is not compelled to give weight to *an allegation that is incontrovertibly demonstrated to be false.*" *United States v. Various Slot Machines*, 658 F.2d 697, 701 (9th Cir. 1981) (emphasis added).

"[T]he nonmovant [may not] rely on deposition statements to the effect that the deponent 'does not remember' a particular fact, as a means of putting that fact in issue." *Carter v. Newsday, Inc.*, 528 F.Supp. 1187, 1191 (E.D.N.Y. 1981); *accord Greensboro Lumber Co. v. Georgia Power Co.*, 643 F.Supp. 1345, 1368 (N.D. Ga. 1986); *Erickson v. Said*, 42 F.R.D. 170, 172-73 (S.D.N.Y. 1967). It is also well-established that "[t]he party opposing summary judgment cannot create a genuine question of fact by *contradicting his prior sworn statement.*" *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1410 (9th Cir. 1987) (emphasis added); *Reisner v. Gen. Motors Corp.*, 671 F.2d 91, 93 (2d Cir.), *cert. denied*, 459 U.S. 858 (1982). This principle applies both to contradictions between a party's deposition testimony and his affidavit, and to contradictions within a party's deposition testimony itself. *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 544 (9th Cir. 1975). The rule also applies to contradictions in a nonparty witness's testimony, *Martin v. City of New York*, 627 F.Supp. 892, 896 (E.D.N.Y. 1985), and to contradictions between deposition

testimony and the deponent's earlier unsworn memoranda, *Tryco Trucking Co. v. Belk Stores Services, Inc.*, 634 F.Supp. 1327, 1337 (W.D.N.C. 1986). Such self-created issues of fact "are not issues which this Court could reasonably characterize as genuine; rather, they are sham issues which should not subject the defendants to the burden of a trial." *Radobenko*, 520 F.2d at 544. Moreover, blatant contradictions in a witness's testimony justify a conclusion by the court that it "cannot and need not give credence to [that witness's] word as evidence in opposition to [a] motion [for summary judgment]." *CB & F Interamerica, Inc. v. Argo Industrias M & M S.R.L.*, 675 F.Supp. 179, 181 (S.D.N.Y. 1987).

The issues of fact upon which the Court of Appeals relied in the instant case to affirm the denial of petitioners' motion for summary judgment on the ground of qualified immunity are not "genuine" issues of fact under the principles established by the foregoing authorities.

The first such issue is whether respondent Joseph Senk threatened to kill petitioners Dalzell and David Calhoun. Officer Dalzell testified in his deposition that when he went to inform Joseph Senk that he was under arrest for domestic violence, Joseph Senk responded that Officer Dalzell "had better draw [his] [expletive] gun and shoot him, it was the only way [Officer Dalzell] was going to keep [Joseph Senk] from killing [him]." Officers Dalzell and David Calhoun also testified at their depositions that after Joseph Senk kicked out the patrol car window, he told David Calhoun that he was going to take his weapon and kill him.

The Sixth Circuit relied on Mr. Senk's denial that he threatened the officers as well as Paul Testa's testimony that he did not hear any such threat. Mr. Senk's denial

was contained in his affidavit filed after his deposition. The affidavit simply stated that "at no time during his arrest on May 12, 1990, did he threaten the life of any police officer . . . ." As observed above, Mr. Senk made this assertion despite his testimony that he did not remember his actions after experiencing one of his explosive personality outbursts and despite the fact that his own treating physician, Dr. Arthur Brickel, had concluded that Joseph Senk's actions on May 12, 1990 apparently constituted another one of his episodes of "explosive personality outbursts for which he has no recall." "The party opposing summary judgment cannot create a genuine issue of fact by contradicting his prior sworn statement." *Jurado*, 813 F.2d at 1410. As noted above, respondent Patricia Senk also testified that "I know when Joe [Senk] is going through a bad episode" of postconcussion syndrome and that "I was trying to control it this time, to find out what was wrong" just before Mr. Senk attacked her that evening.[4] Therefore, Joseph Senk's purported recollection that he did not threaten any officer is not genuine. "Evidence that is too incredible to be accepted by reasonable minds does not raise an issue of credibility to defeat a motion for summary judgment." *Cannon*, 31 F.Supp. at 33, 34. "[I]f the factual context

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[4] Although Mrs. Senk remembered what happened before she was attacked by her husband, she had no clear recollection of what happened afterward. In particular, she testified that she had no recollection or knowledge of any action of any police officer who arrived at the scene. Accordingly, respondents do not rely on Mrs. Senk as an eyewitness to any of the interactions between the police officers and Mr. Senk.

renders [the respondents'] claims implausible[, respondents] must come forward with more persuasive evidence to support their claims than would otherwise be necessary." *Matsushita*, 475 U.S. at 587.

Respondents would, at first blush, seem to have such "more persuasive evidence" in the testimony of Paul Testa that he did not hear any threats. However, Mr. Testa admitted in his deposition that there were loud voices going back and forth and a lot of commotion at the time; "[e]verybody was saying stuff, you know, and I don't know" what, if anything, Joseph Senk said to the police officers. Accordingly, Paul Testa's testimony on this issue is devoid of probative value.

Because "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial' " on the question as to whether Joseph Senk threatened the lives of the police officers. *Matsushita*, 475 U.S. at 587. Respondents have no "significantly probative evidence", *Liberty Lobby*, 477 U.S. at 249-50, to negate the officers' testimony that respondent Joseph Senk threatened to kill them.

The second issue of fact upon which the Court of Appeals relied was the question of whether Joseph Senk grabbed the officers' gunbelts. Officers Dalzell and David Calhoun testified at their depositions that after Joseph Senk kicked out the car window and told David Calhoun that he was going to take his weapon and kill him, Mr. Senk reached outside the patrol car and grabbed David Calhoun's gunbelt, approximately two to three inches from his weapon, and pulled David Calhoun toward him. After unsuccessfully attempting to push Mr. Senk's arm away, Officer David Calhoun struck Joseph Senk across the forearm with his flashlight. Although this caused Mr.

Senk to lose his grip on David Calhoun's gunbelt, Mr. Senk subsequently grabbed the gunbelt of Officer Dalzell. After unsuccessfully attempting to manually free himself from Mr. Senk's grip, petitioner Dalzell punched Joseph Senk in the face and Mr. Senk then released his grip.

Again, the Sixth Circuit relied on the statement in Mr. Senk's affidavit that "at no time during his arrest on May 12, 1990, . . . did he attempt to gain control of any gun or gun belt" and on Paul Testa's testimony that he did not see Mr. Senk grab an officer's gunbelt. As demonstrated above, Mr. Senk's purported recollection of these events is not genuine since it is totally inconsistent with his pattern of not recalling events that occur during his explosive episodes of postconcussion syndrome. Moreover, Paul Testa's testimony that he did not see Mr. Senk grab an officer's gunbelt does not even contradict the officers' testimony because Mr. Testa was not, by his own admission, looking at the officers and Mr. Senk at all times during these events. The testimony of Mr. Testa, in light of the fact he was not continuously observing the altercation, is in no way inconsistent with the testimony of the officers. Furthermore, the officers' testimony is corroborated by the testimony of eyewitness Frank Guffin, who, from a distance, observed Joseph Senk lunge at and grab the waist of one of the officers. Again, because respondents' evidence is "implausible" and not "significantly probative", it creates no *genuine* issue of fact. *Matsushita*, 475 U.S. at 587; *Liberty Lobby*, 477 U.S. at 249-50; *Cities Service*, 391 U.S. at 280-90. "[T]he record taken as whole", *Matsushita*, 475 U.S. at 587, can lead the rational trier of fact to only one conclusion: Respondent

Joseph Senk did, in fact, grab each of the officers' gunbelts, in succession, after threatening to take their guns and kill them.

The third factual issue upon which the Sixth Circuit relied in denying petitioners' motion for summary judgment is whether Officer David Calhoun struck Joseph Senk on the head three times with a flashlight when the latter had his head out of the window of the police cruiser after he broke the glass in the window and whether the officers beat him with their fists after Joseph Senk was out of the cruiser. The medical evidence supports the officers' testimony that such violence against Mr. Senk did not occur: The medical evidence of record (including the emergency room sheet, the deposition of the emergency room physician, and the deposition of the emergency room nurse) established only that Mr. Senk had a single laceration above his eyebrow; no medical evidence exists of any lacerations, contusions, bruises, or other evidence of beating on any other part of Mr. Senk's head or body. Respondents rely on nonmedical evidence such as inadmissible double hearsay in a Sheriff's report (mischaracterized by respondents as a doctor's report) that "there were bruises across his forehead caused by a superficial trauma", the testimony of Paul Testa that he saw an officer strike Joseph Senk three times on the head with a flashlight, and Patricia Senk's testimony that, for example, when she visited her husband at the hospital "I ran my fingers through his hair and he was totally a mess of cuts and lumps." However, it is "implausible", *Matsushita*, 475 U.S. at 587, that Mr. Senk's attending emergency room physician and nurse would have missed such injuries, if the injuries had in fact existed, in their observations and reports. "Even on a motion for summary

judgment, a court is not compelled to give weight to an allegation that is incontrovertibly demonstrated to be false." *Various Slot Machines*, 658 F.2d at 701.

The Court of Appeals also relied on the testimony of Paul Testa and Michael Lucas, another witness, regarding the alleged actions of Officer Christine Calhoun. Although petitioner Christine Calhoun denies the truth of much of this testimony, the factual dispute as to her actions is not material. For even Paul Testa admits that at the time of Officer Christine Calhoun's actions "[s]he hollered something like he broke the handcuffs or something or broke the cuffs . . . ." The Court of Appeals ignored this critical fact, which was brought to its attention in petitioners' appellate briefs and the references therein to the evidence of record.

Therefore, the Sixth Circuit rested its denial of summary judgment to petitioners on evidence that was legally insufficient to create a genuine issue of material fact. The Court of Appeals did not address the arguments in petitioners' appellate briefs that the evidence in question failed to create a *genuine* issue of fact when analyzed from the perspective of the decisions of this Court and other federal courts on summary judgment principles. The refusal of the Sixth Circuit to address the question of the *genuineness* of the factual issues is especially disturbing in the context of a motion for summary judgment based on qualified immunity, for this Court "repeatedly [has] stressed the importance of resolving immunity questions at the earliest possible stage of litigation." *Hunter v. Bryant*, 112 S.Ct. 534, 536 (1991). "Immunity ordinarily should be decided by the court long before trial." *Id.* at 537. The Sixth Circuit's refusal to address the precise issue of the genuineness of the factual issues in a

qualified immunity appeal is in direct conflict with the decisions of this Court and of the courts in other circuits on the principles of summary judgment and qualified immunity. Accordingly, it is important that the Court grant certiorari to resolve this conflict.

II. THE PRINCIPLE OF QUALIFIED IMMUNITY IN *ANDERSON V. CREIGHTON*, 483 U.S. 635, 640 (1987), THAT "THE RIGHT THE OFFICIAL IS ALLEGED TO HAVE VIOLATED MUST HAVE BEEN 'CLEARLY ESTABLISHED' IN A MORE PARTICULARIZED, AND HENCE MORE RELEVANT, SENSE" APPLIES TO ALLEGATIONS THAT POLICE OFFICERS USED EXCESSIVE FORCE IN VIOLATION OF THE FOURTH AMENDMENT AND 42 U.S.C. § 1983.

In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court summarized the basic qualified immunity standard set forth in its prior caselaw by stating that "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Id.* at 639 (citations omitted). The Court's analysis in *Creighton* elaborated upon this test as follows:

> The operation of this standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (*no matter how unclear it may be that the particular action is a violation*) violates a clearly established right. Much the same could be said of any other

> constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. . . . [O]ur cases establish that *the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.* This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that *in light of pre-existing law the unlawfulness must be apparent.*

Creighton, 483 U.S. at 639-40 (emphasis added) (citations omitted).

In *Creighton*, the Court held that the Eighth Circuit misapplied the foregoing principles:

> The Court of Appeals' brief discussion of qualified immunity consisted of little more than an assertion that a general right Anderson was alleged to have violated – the right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances – was clearly established. The Court of Appeals specifically refused to consider the argument that it was *not* clearly established that the circumstances with which Anderson was confronted did not constitute probable cause and exigent circumstances. The previous discussion should make clear that this refusal was erroneous. We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we

> have indicated that in such cases those officials – like other officials who act in ways they reasonably believe to be lawful – should not be held personally liable. The same is true of their conclusions regarding exigent circumstances.

Id. at 640-41 (emphasis in original) (citation omitted).

Thus, qualified immunity analysis "will often require examination of the information possessed by the . . . officials." *Creighton*, 483 U.S. at 641. "The relevant question . . . is the objective (albeit fact-specific) question whether a reasonable officer could have believed [the actions of the defendant officers] to be lawful, in light of clearly established law and the information the . . . officers possessed." *Id.*

Like the Eighth Circuit's opinion in *Creighton*, the Sixth Circuit's analysis of "clearly established law" in the present case was merely a brief discussion of general principles. (App., *infra*, 7a-8a). The Court of Appeals cited no Supreme Court decisions on excessive force. The Sixth Circuit cases on excessive force cited by the Court of Appeals all involved police *shootings*, and only one of these cases predated the events of May 12, 1990. The respondents in this case have *never* claimed that the police officers *shot* anyone. The Sixth Circuit cited no Supreme Court or Sixth Circuit cases on excessive force even generally analogous to the fact situation in the instant case. Although the Sixth Circuit cited authority from another circuit as to the liability of petitioners Rinehardt and May, *Rutherford v. City of Berkeley*, 780 F.2d 1444 (9th Cir. 1986), that case was based on the substantive due process approach to excessive force liability expressly rejected by this Court in *Graham v. Connor*, 490

U.S. 386, 392-95 (1989). Moreover, a Ninth Circuit case can hardly constitute "clearly established law" for police officers in the Sixth Circuit. The Court of Appeals cited no other cases on excessive force. Therefore, as a matter of definition, the Sixth Circuit's opinion itself demonstrates an absence of "clearly established law" on the applicability of the Fourth Amendment to fact situations analogous to that of the case at bar. This conclusion necessarily follows even if one accepts – despite the lack of "significantly probative evidence" of record – respondents' version of the facts.

In *Tennessee v. Garner*, 471 U.S. 1, 11 (1985), the Court held that "[a] police officer may not seize an unarmed, *nondangerous* suspect *by shooting him dead*." (Emphasis added.) It is undisputed in the case at bar that respondent Joseph Senk had already physically attacked his wife, had destroyed property, and was acting in a bizarre manner when the police officers – who were aware of these events and had observed some of them firsthand – took action to restrain him. Accordingly, it cannot be said that no reasonable police officer in the positions of petitioners would have concluded that Joseph Senk was dangerous.[5]

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[5] "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon *or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm*, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Garner*, 471 U.S. at 11-12 (emphasis added).

Moreover, it is undisputed that no petitioner used a gun or knife against Joseph Senk. Therefore, *Tennessee v. Garner* does *not* constitute "clearly established law" supporting any theory that petitioners used constitutionally excessive force against respondent Senk.

In *Graham, supra,* the Court considered the general test for a claim that a police officer used constitutionally excessive force. "Where . . . the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons . . . against unreasonable . . . seizures' of the person." *Graham,* 490 U.S. at 394. In *Graham,* the Court analyzed the Fourth Amendment reasonableness test as follows:

> Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. . . . Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," . . . , however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime, *whether the suspect poses an immediate threat to the safety of the officers or others,* and whether he is *actively resisting arrest or attempting to evade arrest by flight.* See *Tennessee v. Garner,* 471 U.S., at 8-9 (the question is "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure").

Graham, 490 U.S. at 396 (emphasis added).

"The 'reasonableness' of a particular use of force must be judged from the perspective of the reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. The Court elaborated upon this principle as follows:

> With respect to a claim of excessive force, the . . . *standard of reasonableness at the moment* applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," . . . violates the Fourth Amendment. *The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.*
>
> As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

Graham, 490 U.S. at 396-97 (emphasis added).

In *Graham*, the Court expressed no view on the proper application of qualified immunity to excessive force cases because no claim of qualified immunity had been raised in that case. *Id.* at 399 n.12. The instant case provides the Court with an opportunity to address the legal issue that it necessarily reserved in *Graham* and which it has not addressed in any other decision: Does the principle of qualified immunity in *Anderson v. Creighton*, 483 U.S. at 640, that "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant,

sense", apply to allegations that police officers used excessive force in violation of the Fourth Amendment and 42 U.S.C. § 1983?

Furthermore, two circuits have expressed doubt that qualified immunity even applies in excessive force cases. *Hunter v. District of Columbia*, 943 F.2d 69, 77 (D.C. Cir. 1991) ("We too doubt whether a substantively distinct qualified immunity defense would be available to an officer acting after *Graham [v. Connor]*"); *Street v. Parham*, 929 F.2d 537, 539 n.1 (10th Cir. 1991). It is important for the Court to clarify whether the doctrine of federal qualified immunity applies to excessive force cases and, if so, whether excessive force cases require different qualified immunity principles from those set forth in *Creighton*.

III. *HUNTER V. BRYANT*, 112 S.CT. 534 (1991), REQUIRES THE QUESTION OF THE OBJECTIVE REASONABLENESS OF INDIVIDUAL POLICE OFFICERS' USE OF FORCE TO BE DETERMINED BY THE COURT ON SUMMARY JUDGMENT WHERE, CONSIDERING THE GENUINE, MATERIAL EVIDENCE OF RECORD AS A WHOLE, THE DEGREE OF FORCE EMPLOYED BY THE OFFICERS WAS REASONABLE, EVEN IF MISTAKEN.

In its recent decision in *Hunter v. Bryant, supra*, this Court reversed the Ninth Circuit's affirmance of a denial of a motion of certain Secret Service agents for summary judgment on the ground of qualified immunity. This Court held that "[t]he decision of the Ninth Circuit ignores the import" of the Court's earlier decisions on qualified immunity:

> The Court of Appeals' confusion is evident from its statement that "[w]hether a reasonable officer could have believed he had

> probable cause is a question for the trier of fact, and summary judgment . . . based on lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach." 903 F.2d, at 721. This statement of law is wrong for two reasons. First, *it routinely places the question of qualified immunity in the hands of the jury. Immunity should ordinarily be decided by the court long before trial. . . .* Second, *the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.*

112 S.Ct. at 536-37 (emphasis added).

The Court held that the agents were entitled to qualified immunity: "Even if we assumed, *arguendo*, that they . . . erred in concluding that probable cause existed to arrest Bryant, the agents nevertheless would be entitled to qualified immunity *because their decision was reasonable, even if mistaken.*" 112 S.Ct. at 537 (emphasis added). Similarly, the Court held in *Malley v. Briggs*, 475 U.S. 335, 341 (1986) that "if officers of reasonable competence could disagree on [the] issue, immunity should be recognized."

As demonstrated in Part I of the "Argument", *supra*, respondents lack significantly probative evidence to create a genuine issue of fact as to whether the petitioners committed the types of acts alleged by respondents. Moreover, as demonstrated in Part II of the "Argument", even assuming, *arguendo*, that genuine issues existed as to these factual matters, petitioners would nevertheless be entitled to qualified immunity because no clearly established law at the time of the events had defined such conduct as violative of the Fourth Amendment. The

Court's decisions in *Hunter v. Bryant* and *Malley v. Briggs* underline the significance of these qualified immunity principles and re-emphasize the importance, in a qualified immunity context, of a strict examination of whether the purported factual issues are indeed "genuine" within the meaning of this Court's decisions on summary judgment. Moreover, *Hunter* emphasizes the principle that the court, not the jury, decides the question of objective reasonableness. The present case offers the Court an opportunity to elaborate upon and apply its qualified immunity and summary judgment principles in the context of excessive force claims. As observed above, the circuits are in a state of confusion and disagreement regarding the application of these principles to excessive force cases. Clarification from this Court is needed to resolve these conflicts.

In addition or in the alternative, the Court might take the approach set forth in *Siegert v. Gilley*, 111 S.Ct. 1789 (1991) that "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." It is the position of petitioners that, even apart from qualified immunity, respondents cannot establish – under either respondents' or petitioners' versions of the facts – a constitutional violation. This inquiry involves the applicability of *Graham* to issues not reached in that case. For example, once it is appropriate, under the principles recognized in this Court's cases, for a police officer to use force, to what extent should the courts make fine distinctions about the degree of force employed when "allow[ing] for the fact that police officers are often

forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving . . . ."? *Graham*, 490 U.S. at 397. In addition, the facts and the approaches of the lower courts in the instant case give rise to the question whether the tort principle that the defendant takes the plaintiff as he finds him is applicable in a constitutional context. The respondents have attempted to establish the degree of force used in this matter by the results to a person who already had serious brain injury. In this manner, the question arises whether the factor of "the extent of the injury inflicted" in *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) has been improperly introduced in this case in light of the Court's rejection of the *Johnson v. Glick* analysis in *Graham*.

CONCLUSION

As explained above, this case presents many significant questions for the Court's consideration, including some issues involving conflicts between the circuits. Therefore, petitioners request that the Court issue a writ of certiorari to the Sixth Circuit Court of Appeals to review its judgment in the instant case.

Respectfully submitted,

Leo R. Ward
Counsel of Record
Alan E. Johnson
Ward & Associates, A Legal Professional Association
The Dallas Building
2217 East Ninth Street
Cleveland, Ohio 44115
(216) 241-0515

Attorneys for Petitioners

APPENDIX

NO. 91-3823

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH E. SENK, et al., Plaintiffs-Appellees, v. VILLAGE OF NORTHFIELD, et al., Defendants-Appellants.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. *This notice is to be prominently displayed if this decision is reproduced.*

Decided and Filed *[April 22, 1992]*

BEFORE: **GUY** and **NELSON**, Circuit Judges, and **REAVLEY**, Senior Judge.*

PER CURIAM. This is a civil rights action that was brought in federal court by a husband and wife who alleged, among other things, that excessive force was used in arresting the husband after his participation in a violent domestic altercation. The plaintiffs also claimed that their constitutional rights were violated by a search

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*The Honorable Thomas M. Reavley, Senior Circuit Judge for the Fifth Circuit, sitting by designation.

of their house conducted by one of the defendants after the arrest.

Asserting qualified immunity, six defendants, all of them police officers, moved for summary judgment. The district court denied the motion, and the officers perfected a timely interlocutory appeal. The principal question on appeal is whether the court erred in concluding that there were genuine issues of material fact that precluded summary disposition of the claims against the officers.

Concluding that the district court was correct, in the main, we shall affirm the denial of summary judgment as to the officers (five in number) who are alleged to have used excessive force. We believe that the officer who conducted the challenged search was entitled to qualified immunity, however, and we shall direct that judgment be entered in his favor on remand.

I

Plaintiff Joseph Senk, who is said to have suffered from post-concussion syndrome, had an explosive outburst in which he trashed his kitchen and attacked his wife. Defendant Ronald Dalzell, a police officer employed by the Village of Northfield, Ohio, was dispatched to the Senk residence in response to a 911 telephone call. Officer Dalzell requested assistance from the Sagamore Hills police department, and Officer David Calhoun, another defendant, responded to this request.

The two policemen arrived at the Senk residence at about the same time. Mr. Senk told Officer Calhoun that

he and his wife had been fighting and that he had been drinking. The officers found that Mrs. Senk had red marks on her neck and chin, indicating that she had been grabbed around the neck. Mrs. Senk told the officers that her husband had beaten her in the chest and abdomen, that he had attempted to choke her, and that she was having trouble breathing, had abdominal pains, and could taste blood in her mouth. She allegedly warned the officers that Mr. Senk was violent and would attempt to hurt them if placed under arrest.

The officers summoned a rescue squad for Mrs. Senk, and Officer Calhoun escorted Mr. Senk to a patrol car. The parties disagree as to whether Mr. Senk was handcuffed at this time, but it is undisputed that he offered no resistance. Meanwhile, a Sagamore Hills police dispatcher sent Officers Christine Calhoun (the wife of David Calhoun), Philip Rinehardt, and Kevin May to the scene. These individuals too have been named as defendants.

Mrs. Senk says that she asked an emergency medical technician to call her oldest daughter and tell the daughter to pick up two other children. The technician was given permission to use the telephone in the house for that purpose, according to Mrs. Senk, but the officers say that she gave them permission to enter the house. Both sides agree that Officer David Calhoun and Officer Dalzell entered the Senk residence to make the call. Inside, Calhoun observed that a kitchen cabinet had been tipped over and its contents scattered about the floor.

Officer Dalzell asked Mrs. Senk if she wanted to press charges against her husband. She said she did. Officer Dalzell then went to the patrol car to inform Mr.

Senk that he was going to be taken into custody for domestic violence. Officers Christine Calhoun, Rinehardt, and May arrived shortly thereafter.

The parties' accounts of what happened next differ sharply. Officer Dalzell says that when he informed Mr. Senk, who was still sitting in the police car, that he was under arrest for domestic violence, Senk responded that "I had better draw my fucking gun and shoot him, it was the only way I was going to stop him from killing me." The Senks' version is that Mr. Senk was screaming at the officers for entering his house, and Officer Dalzell stuck his head inside the front door of the cruiser to tell him to "shut his fucking mouth." Whatever may have been said, both sides agree that Mr. Senk kicked out the side window of the police car after the exchange with Officer Dalzell.

Officers Dalzell and David Calhoun say that Mr. Senk then reached out of the broken window and threatened to take Officer Calhoun's gun and shoot him. Mr. Senk allegedly grabbed the officer's gun belt. Officer Calhoun says he responded by striking Mr. Senk across the forearm with his flashlight, causing him to release his grip on the gun belt, and pushed him back into the vehicle. Mr. Senk then allegedly grabbed Officer Dalzell's gunbelt, and Dalzell freed himself by punching Mr. Senk in the face.

Mr. Senk attempted to force his way through the broken window at this point, according to Officer Calhoun. All of the officers then on the scene attempted to push him back into the car, but they could not do so. The officers say that they tried unsuccessfully to handcuff Mr.

Senk as he was coming out the window, and Mr. Senk fell out the window face-first onto the ground. Once outside the car, Mr. Senk kicked and thrashed about until he was subdued.

Mr. Senk, for his part, denies that he threatened the life of any officer, or grabbed an officer's gun belt, or assaulted an officer. He points to deposition testimony given by a neighbor, Paul Testa, who said that after Mr. Senk kicked out the car window, Officer David Calhoun yelled "Goddamn it Joe, you really fucked up now, this is a brand new cruiser." Mr. Testa testified that Officer Calhoun immediately struck Mr. Senk on the head three times in rapid succession "with a big damn flashlight." Mr. Testa said he did not hear Mr. Senk threaten to kill a police officer and did not see Mr. Senk try to grab an officer's gun or gun belt. He did see Mr. Senk reach his hands out the window, but his impression was that Mr. Senk was merely trying to protect himself from Officer Calhoun.

Mr. Testa recalls that one of the officers then opened the car door, and Mr. Senk, dazed, stepped out. As he stood on the ground, all of the officers who were on the scene began to beat him with their fists. The officers then "literally kicked [Senk's] feet out from underneath him." At this point, with Mr. Senk handcuffed and on the ground, Officer Christine Calhoun, who weighed about 200 pounds, leaped on him. According to Michael Lucas, another witness, Mrs. Calhoun "was either bouncing on him or applying some type of pressure to him that seemed unnecessary." Lucas said she had Senk by the throat, and Testa said that her nightstick was pressed against his throat, choking him.

Mr. Senk was taken to a hospital by ambulance. He suffered a respiratory arrest and allegedly lay in a coma for five weeks. He had trauma to the head, a dislocated elbow, and multiple bruises and lacerations to the head, face, and arms. It is alleged that he lost his sight and suffered brain damage as a result of the beating by the police.

Defendant Larry Felean, another policeman, arrived at the scene shortly after Mr. Senk was finally restrained. Officer Dalzell told Felean that there had been domestic violence at the Senk house and asked him to go back to the police station, get a camera, and take pictures of the inside of the residence. Officer Felean did so, and also examined some papers inside the house.

The Senks brought suit under 42 U.S.C. § 1983 against the Village of Northfield, the Township of Sagamore Hills, the individual police officers, and three emergency medical technicians. Asserting qualified immunity defenses, the police officers moved for summary judgment. The district court denied the motion, and this appeal followed.

II

The defendants contend that Mr. Senk posed an immediate threat to the safety of the officers, that they used only moderate force against him, and that their behavior was objectively reasonable under the circumstances. *Graham v. Connor*, 490 U.S. 386, 396 (1989). Given the sharp conflict in the evidence, only a jury can decide whether the facts are as the officers say they are.

In *Yates v. City of Cleveland*, 941 F.2d 444 (6th Cir. 1991), we held that the standard for determining qualified immunity in excessive force cases is the general standard set out in *Anderson v. Creighton*, 483 U.S. 635 (1987): "whether an objectively reasonable officer" would believe that the conduct in question was lawful. *Yates*, 941 F.2d at 445-47. If the level of force used by the officers was necessary to remove a threat to their safety, for example, or was necessary to avoid the use of lethal force, a grant of qualified immunity would be appropriate. See *Russo v. City of Cincinnati*, 953 F.2d 1036, 1044-45 (6th Cir. 1992); *Brandenburg v. Cureton*, 882 F.2d 211, 215 (6th Cir. 1989). Immunity would doubtless be appropriate here if it were undisputed that the facts were as claimed by the officers. If the Senks' version of the facts is correct, however, the officers who are accused of using excessive force would clearly not be entitled to qualified immunity. In this case, as in *Brandenburg*, 882 F.2d at 216, "the legal question of qualified immunity is completely dependent upon which view of the facts is accepted by the jury." Summary judgment based on qualified immunity is therefore inappropriate. *Yates*, 941 F.2d at 447.

It is contended on behalf of Officers May and Rinehardt that they are entitled to summary judgment because the Senks' brief opposing the summary judgment motion presented no specifics detailing their participation in the alleged beating. Witness Lucas stated that five or six officers wrestled Mr. Senk to the ground, however, and that there were at least five officers on top of Mr. Senk when Christine Calhoun choked him. Only five officers were present at the time, and Officers May and Rinehardt were among that number; Mr. Lucas' statement

thus raises an issue of fact as to whether they participated in illegal conduct. See *Rutherford v. City of Berkeley*, 780 F.2d 1444, 1448 (9th Cir. 1986).

It is contended on behalf of Officer Christine Calhoun that there was no evidence that she used unreasonable force in employing her nightstick to restrain Mr. Senk. The testimony given by Mr. Testa could well support the plaintiffs' claim, however, and the statement of Mr. Lucas seems clearly to do so. Summary judgment would not be appropriate for this defendant.

III

As to the contention that Officer Felean conducted an unconstitutional serch [sic] of the Senks' house, it is undisputed that no search warrant was obtained. Officer Felean testified, however, that he operated under the assumption that Officer Dalzell, his senior officer, had obtained Mrs. Senk's consent to the search. Such an assumption was objectively reasonable, in our opinion.

Mrs. Senk had unquestionably been the victim of a serious assault by her husband, and she had agreed to press criminal charges against him. Officer Felean was told by his superior that violence had taken place inside the house and that he should take pictures for evidentiary purposes. He had no reason at all to suppose that Mrs. Senk had not agreed to the gathering of evidence to support the charges she said she wanted to bring. On remand, therefore, summary judgment should be entered in favor of Officer Felean.

AFFIRMED in part, **REVERSED** in part, and **REMANDED** for further proceedings not inconsistent with this opinion.

REAVLEY, Circuit Judge, Concurring in part and Dissenting in part.

I would affirm the judgment of the district court. Without consent to search, a fact issue about which there is a square conflict, the officers had no right to search. It would be the same if Officer Dalzell erroneously told Officer Felean that a warrant had been issued.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOSEPH E. SENK, et al. Plaintiff – vs – VILLAGE OF NORTHFIELD, et al. Defendant	)	CASE NO. 90-CV-1699 Judge Sam H. Bell ORDER

Currently pending before the court in the above-captioned matter is a motion for summary judgment filed pursuant to Fed. R. Civ. P. 56 by defendants David Calhoun, Christine Calhoun, Kevin May, Philip Richard, Ronald Dalzell, and Larry Felean in their individual capacities. The underlying complaint alleges a cause of action under 42 U.S.C. §1983 against ten defendants, as follows: excessive and unnecessary force on the part of D. Calhoun, C. Calhoun, May, Rienhardt, and Dalzell in their official and individual capacities (Count I); failure to provide adequate medical assistance as to paramedics Frank Guffin and Kenneth Guffin in their official and individual capacities (Count II); unlawful search on the part of Felean in his official and individual capacities (Count III); failure to train and supervise on the part of the municipal defendants, the Village of Northfield and the Township of Sagamore Hills, along with Frank Guffin (Count IV); and punitive damages as to all defendants (Count V). In addition, the complaint alleges pendent state law claims of intentional infliction of emotional distress (Count VI) and loss of consortium (Count VII). Plaintiffs Joseph E. and Patricia A. Senk seek monetary

and punitive damages "in an amount that will fully and fairly compensate them," attorney's fees, and costs.

The motion for summary judgment filed on behalf of police defendants D. Calhoun, C. Calhoun, May, Rienhardt, Dalzell, and Feleppa raises the defense of qualified immunity as to Counts II and III of the complaint. Plaintiffs oppose this motion, arguing that genuine issues of material fact exist which preclude the granting of the police defendants' motion for summary judgment.

I. BACKGROUND

The factual scenario which led to the filing of the complaint stems from an assault allegedly imposed upon J. Senk by defendants D. Calhoun, C. Calhoun, Rienhardt, May, and Dalzell. On or about May 12, 1990, plaintiffs Joseph and Patricia Senk were engaged in a marital dispute at their residence. Responding to a telephone call, the five defendant police officers, comprised of members from both the Northfield and Sagamore Hills police departments, arrived at plaintiffs' residence and arrested Joseph Senk. During Senk's arrest, the five officers allegedly inflicted a severe beating upon Mr. Senk which subsequently led to alleged severe injuries. There are radically opposed versions of the scuffle between J. Senk and defendants, depending on which version one follows.

According to the testimony of the police defendants, any force utilized in subduing Senk was necessary due to Senk's threatening and resistant behavior. Initially, everyone is in agreement that plaintiff was calm when the officers arrived, offering no resistance when led inside

the police cruiser. While plaintiff was sitting in the rear of the cruiser, Dalzell informed him he was under arrest for domestic violence (Dalzell Deposition at 49). At this point, according to Dalzell, Senk asked Dalzell "how bad I wanted to kill him" and that Senk "told me I had better draw my (expletive) gun and shoot him, it was the only way I was going to stop him from killing me." (*id.* at 51). After this, Dalzell states that plaintiff reached out of the broken window and told D. Calhoun that he (Senk) would take his (D. Calhoun's) gun and shoot him (Dalzell at 54, D. Calhoun Deposition at 59, 61).

According to both Dalzell and D. Calhoun, Senk then grabbed D. Calhoun's gun belt approximately six inches from the gun itself, although both admit he never actually touched the gun itself (Dalzell at 57-58); D. Calhoun at 63, 65). Dalzell also states that Senk grabbed his gun belt (Dalzell at 61). D. Calhoun then struck plaintiff across the forearm with his flashlight (D. Calhoun at 66), but testifies that at no time did he strike him on the head (*id.* at 67).

According to D. Calhoun, Mr. Senk then attempted to force his way through the broken window (D. Calhoun at 68). The officers attempted to push him back into the car, but plaintiff somehow wriggled free (*id.* at 69-71). The officers tried to handcuff Senk as he was coming out the window, but were unsuccessful (*id.* at 75). Plaintiff's body went straight from the window of the cruiser to the ground when he came out of the cruiser's window (*id.* at 74). After this, Senk kicked and thrashed for a brief period of time, but was eventually subdued. According to Dalzell, Senk never actually hit any of the officers during this time (Dalzell at 77).

In plaintiffs' brief in opposition to the motion for summary judgment, a completely different version of the facts is set forth. First, in an affidavit, Mr. Senk testifies that he never threatened the life of any officer, never grabbed an officer's gun belt, and never assaulted an officer on the night of his arrest. The deposition testimony of an eyewitness, Paul Testa, supports this version. According to Testa, while plaintiff was sitting in the cruiser, D. Calhoun reached in and struck Senk on the head with a flashlight three times (Testa Deposition at 10; *see also* J. Senk Deposition at 63, 145). At no time did Senk ever strike an officer, because his arms were never free (Testa at 15). Most importantly, Testa's statements indicate that plaintiff never grabbed an officer's gun belt or threatened any of them:

> Q. Okay. At any time at all during your observation that evening, did you see Joe grab or attempt to grab anyone by the throat for example?
>
> A. No.
>
> Q. At any time during that evening, did you see Joe attempt to grab any police officer's gun or gun belt?
>
> A. No, no, no.
>
> Q. Did you at any time hear Joe Senk threaten to kill one of the police officers?
>
> A. No.

Testa at 16. Testa, in fact, believed that, rather than resisting, Senk was only attempting to defend himself from the policemen (Testa at 77). Even one of the defendants,

Rienhardt, does not recall ever seeing plaintiff grab an officer's gun belt or strike an officer (Rienhardt at 47-48).

After Senk had exited the cruiser, Testa recalls, the officers commenced beating him with their fists while he was standing (Testa at 82). It should be recalled that, according to D. Calhoun, J. Senk was never standing during this period, but went straight from the window to the ground). The officers then "literally kicked [Senk's] feet out from underneath him" (Testa at 16-17, 82), at which point Senk dropped and "hit the concrete" on "his tail end, on his backside" (*id.*).

At this point, according to Testa, C. Calhoun, weighing 200-220 pounds (Michael Lucas, eyewitness, Deposition at 8), leaped on Senk (Testa at 17) while he was on the ground, handcuffed. According to Lucas, C. Calhoun was "bouncing" on Senk's chest with her knee and choking him with her nightstick.

> Q. Getting back to the lady police officer, and you emphasized the fact that she had a knee on his chest and choking him with something, and you just indicated to me additionally that she was bouncing on his chest?
>
> A. Yes, she was coming up off the ground and coming back down on top of his chest, because like I said, his back or his side was on the ground. He was not face to the ground, his back was down there, and it seemed like she was either bouncing on him or applying some type of pressure to him that seemed unnecessary. Like I said, he was already on the ground being subdued.

Q. And she also had him by the throat?

A. She had him right there without a doubt.

Lucas at 10. Lucas also stated that the officers were being "extremely rough" with Mr. Senk (Lucas at 9-10).

Subsequent to these events, plaintiff was taken to the hospital in an ambulance, suffered respiratory arrest, and allegedly lay in a coma for five weeks.

With regard to the fourth amendment claim against Felean, the evidence indicates that Mrs. P. Senk may have given consent to one of the officers, D. Calhoun, to enter the Senks' residence in order to telephone her daughter (D. Calhoun at 48). However, P. Senk denies having given such consent to any police officer, claiming that she only gave such consent to a paramedic (P. Senk at 121). While in the house, D. Calhoun noticed damage which had, apparently, resulted from the incident of domestic violence between plaintiffs (*id.* at 49-50). D. Calhoun was in the house for approximately "a minute, maybe less" while telephoning P. Senk's daughter (*id.* at 52).

Felean arrived upon the scene approximately forty-five minutes later. At that time, defendant Dalzell instructed Felean to obtain a camera from the police station and then return and take pictures of the inside of the residence (Felean at 74-75). Felean did as instructed, and took several snapshots of the inside of plaintiff's home.

It is undisputed that neither Felean nor any of the other officers obtained a search warrant, and also that Felean never sought to obtain a warrant (Felean at 92). Felean, however, later testified that he was under the

assumption that Dalzell, his senior officer (*id.* at 75), had obtained consent from Mrs. Senk to take the pictures; thus, he believed the entry into the residence was lawful (*id* at 76, 95). Felean also testified that neither Dalzell nor anyone else had informed him that such consent had ever actually been given (*id.*) He also testified that he had no reason to believe that the evidence of domestic violence within the residence would disappear at any time soon (*id.* at 102).

II. ANALYSIS

In reviewing a motion for summary judgment, a court must consider the pleadings, related documents, evidence, and all reasonable inferences in a manner most favorable to the non-moving party. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 86 L.Ed.2d 142 (1970); *Smith v. Hudson*, 600 F.2d 60 (6th Cir. 1979). Rule 56 provides, in relevant part, as follows:

> (c) . . .
>
> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.
>
> . . .
>
> (e) . . .
>
> When a motion for summary judgment is made and supported as provided in this rule, an

> adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Three Supreme Court cases have provided guidance as to the nature of the respective burdens allocated under Rule 56. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2502, 91 L.Ed.2d 202 (1986); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The ultimate burden lies with the non-moving party to show the existence of a genuine issue of material fact. "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . In the language of the Rule, the non-moving party must come forward with 'specific facts showing that there is a *genuine issue for trial.*' Fed. Rule Civ. Proc. 56(e)." *Matsushita*, 475 U.S. at 586-587 (emphasis supplied). "In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. The court in *Anderson* held that "the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff had had a

full opportunity to conduct discovery." *Anderson*, 477 U.S. at 257.

On the other hand, the moving party's burden under Rule 56 is lighter.

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. But unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c) . . . suggests the absence of such a requirement.

Celotex, supra, at 323 (emphasis supplied).

The Sixth Circuit Court of Appeals, in *Street v. J. C. Bradford and Co.*, 886 F.2d 1472 (6th Cir. 1989) recently reviewed court decisions and commentary regarding the impact of *Anderson*, *Celotex*, and *Matsushita* on summary judgment practice. The court concluded that a "new era" in summary judgment practice has opened in the court system as a result of these opinions.

> Scholars and courts are in agreement that a "new era" in summary judgments dawned by virtue of the Court's opinions in these cases . . . On the whole, these decisions reflect a salutary return to the original purpose of summary judgments. Over the years, decisions requiring denial of summary judgment if there

> was even a suggestion of an issue of fact and [sic] tended to emasculate summary judgment as an effective procedural device.

Street, supra, at 1476.

The court enunciated the following "new era" principles, among others: as on federal directed verdict motions, the "scintilla" rule applies, *i.e.*, the respondent must adduce more than a scintilla of evidence to overcome the motion; the respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must "present affirmative evidence in order to defeat a properly supported motion for summary judgment"; the trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact. *Id.* at 1479-1480 (footnotes and citations omitted). With these standards in mind, the court will now examine defendants' arguments in order to ascertain whether judgment in their favor as a matter of law is appropriate in this case.

Defendants D. Calhoun, C. Calhoun, Dalzell, Rienhardt, and May argue that the defense of qualified immunity shields them from liability in this case. The standard for deciding the issue of qualified immunity was set forth in *Anderson v. Creighton,* 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). For a thorough discussion of the qualified immunity standard as set forth in *Anderson* and its progeny, *see* this court's companion order regarding the defense as asserted by defendants Frank Guffin and Kenneth Guffin. The court will proceed to apply this standard to the facts herein.

This court's initial inquiry under the qualified immunity doctrine is to determine whether the right alleged to have been violated was clearly established at the time of the five officers' actions. In their motion for summary judgment, defendants do not contend that one's right to be free from the use of excessive government force under the fourteenth and fourth amendments was not clearly established on the evening in question. In *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), the Supreme Court made this clear and also set forth the standard under which to analyze a §1983 claim based upon an excessive force theory. It is this standard under which this court will determine whether defendants have met the second part of the qualified immunity standard, *viz.*, whether the record contains evidence that defendants' conduct rose to such a degree that the reasonable official would have known that what defendants were doing violated J. Senk's clearly established right to be free from the use of excessive force.

In *Graham*, the plaintiff was a diabetic who felt the onset of an insulin reaction and desired to purchase orange juice at a convenience store. Upon seeing a long line at the checkout counter, the plaintiff hurriedly exited, got into a friend's automobile, and instructed the friend to drive to another friend's house. One of the defendants, a police officer, became suspicious of the hurried exit and so stopped the automobile. Backup units arrived, and the officers were told by the friend of the plaintiff's condition. Nonetheless, they handcuffed plaintiff, shoved him face-first into the hood of the automobile, and threw him head-first into the car.

Plaintiff brought suit pursuant to 42 U.S.C. §1983, but the district court granted the defendant's motion for directed verdict, finding that the officers' excessive use of force did not give rise to a cause of action under §1983. The district court relied on a substantive due process test, reasoning that the application of undue force by law enforcement officers deprives a suspect of liberty without due process of law. *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033, 38 L.Ed.2d 324, 94 S.Ct. 462. The due process test, with which the Fourth Circuit Court of Appeals agreed on appeal, is a balancing test and focuses on the need for the application of force, the relationship between that need and the amount of force used, the extent of the injury inflicted, and whether the force was applied maliciously to cause harm or in a good faith effort to maintain order.

The Supreme Court in *Graham* rejected the due process test in an excessive force context under §1983. The Court stated that where the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as a claim invoking the protections of the fourth amendment and its unreasonable search and seizure clause. *Id.*, 490 U.S. at 394. The Court concluded that "*all* claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Id.*, 490 U.S. at 395 (emphasis in original).

Determining the reasonableness of a particular use of force requires an investigation into the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *Id.*, 490 U.S. at 396. In short, "the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.*, 490 U.S. at 397. These standards have been utilized by numerous courts following *Graham* in a variety of excessive force contexts. *See Pleasant v. Zamieski*, 895 F.2d 272 (6th Cir. 1990); *Collins v. Nagle*, 892 F.2d 489 (6th Cir. 1990); *Hay v. City of Irving, Texas*, 893 F.2d 796 (5th Cir. 1990); *Hamm v. Powell*, 893 F.2d 293 (11th Cir. 1990); *Hammer v. Gross*, 884 F.2d 1200 (9th Cir. 1989); *Roach v. City of Fredericktown*, 882 F.2d 294 (8th Cir. 1989); *Calamia v. City of New York*, 879 F.2d 1025 (2d Cir. 1989).

Applying the standard set forth in *Graham* to the facts of this case, it is clear that the conflicting version of facts creates an issue for the jury as to whether the conduct of the five officers in arresting J. Senk was objectively reasonable. It follows from this, of course, that whether the officers should have known that what they were doing violated plaintiff's right to be free from the use of excessive force cannot be judicially determined at this time. Thus, granting these defendants qualified immunity would be inappropriate. While it is undisputed that Mr. Senk kicked out the police cruiser's window, plaintiffs'

version of the facts discussed above establishes that the [sic] was struck in the head with a flashlight three times and was beaten by the officers while already handcuffed and subdued. Most importantly for purposes of the *Graham* analysis, plaintiff's version of the facts creates a jury question as to whether J. Senk "posed an immediate threat to the safety of the officer's [sic] or others," and whether he was "actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. Simply put, there exists evidence in the record which creates jury questions as to the essential elements of plaintiffs' claims and which preclude the defendants' utilization of the protections afforded by the qualified immunity doctrine.

With regard to the fourth amendment unreasonable search claim, defendant Felean's argument is threefold. First, Felean contends that Mr. Senk's subsequent guilty plea to the charge of domestic violence in state criminal proceedings collaterally estops plaintiffs' ability to challenge the legality of Felean's search in a §1983 action. Second, Felean argues that Mrs. Senk's initial consent to enter the residence in order to telephone the daughter given to D. Calhoun amounts to a consent to search the residence nearly one hour later on the part of Felean. Finally, Felean submits that he is entitled to qualified immunity, arguing that no reasonable officer in his position would have known that what he was doing violated plaintiffs' constitutional rights.

None of the asserted arguments are meritorious. With regard to the collateral estoppel proposition, the court initially agrees with defendants that, pursuant to 28 U.S.C. §1738, a federal court faced with a §1983 claim

should give a guilty plea elicited in state criminal proceedings preclusive effect whenever the state courts would do so. *See Walker v. Schaeffer*, 854 F.2d 138, 142 (6th Cir. 1987); *O'Kelly v. Russell Township Board of Trustees*, 675 F.Supp. 389, 391 (N.D. Ohio 1987). However, we do not believe that the Ohio courts would bar a §1983 action based on a fourth amendment illegal search claim by a plaintiff who had earlier pled guilty to a crime based upon evidence revealed in the search. Such an individual would be barred from arguing that the evidence had been illegally obtained, but would not at the same time be precluded from seeking civil redress in a §1983 action for the constitutional deprivation stemming from the illegal entry and search. At least one Ohio court has specifically so held. *See State v. Durst*, 1989 WL 150797 at 2 (Ohio App. Montgomery Cty. Dec. 13, 1989) (unpublished, text in WESTLAW). Felean's position, in essence, is tantamount to an assertion that an individual whose confession is coerced by a beating and who later pleads guilty to the confessed crime is barred from suing the applicable officials for assault and battery or for the unconstitutional use of excessive force under §1983. We do not believe that any such rule of law would survive constitutional scrutiny.

Felean's second argument has several faults, and his reliance upon *United States v. Diaz*, 814 F.2d 454 (7th Cir. 1987), is misplaced. In that case, the Seventh Circuit held that, where an official is granted consent to enter the residence, finds incriminating material, exits for a brief moment, and returns, the first consent extends to the second entry, which is thus deemed lawful. *Id.*, 814 F.2d at 454. This holding does not apply to the facts herein. First,

there is a factual dispute as to whether P. Senk ever gave the consent to a police officer; as previously mentioned, she stated in her deposition testimony that the consent was only given to a paramedic. Second, the court in *Diaz* limited its holding to the situation where the officer *immediately* seeks aid from other officers and reenters.

> We emphasize that we have applied this doctrine of "consent once removed" only where the agent (or informant) entered at the express invitation of someone with authority to consent, at that point established the existence of probable cause to effectuate an arrest or search, and immediately summoned help from other officers. We do not intend to suggest by our analysis that one consensual entry means that law enforcement agents may thereafter enter and exit a home at will.

Id., 814 F.2d at 454. Here, it is uncontroverted that the entry by Felean occurred approximately one hour after that of D. Calhoun. We believe that the "consent once removed" doctrine would be stretched beyond its constitutional limits if utilized in the manner urged by defendants here.

With regard to the qualified immunity argument, Felean does not contend that the constitutional right implicated herein, the fourth amendment "right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances" (or if consent is obtained), *Anderson*, 483 U.S. at 640, was not clearly established on the evening in question. The inquiry, thus, focuses upon whether the record contains evidence which, if accepted as true, supports the claim that Felean acted unreasonably (*i.e.*, that

the reasonable official in Felean's place would have known that the claimed misconduct violated the fourth amendment). The court believes that the record satisfactorily demonstrates that Felean's qualified immunity defense is overcome. While it is undisputed that probable cause existed, Felean's own testimony reveals that the circumstances were, in fact, not exigent (Felean Deposition at 102). Moreover, Felean cannot escape his obligation under the law to obtain a warrant merely by asserting that he "assumed" that the source of D. Calhoun's order to enter and take pictures stemmed from the consent of P. Senk. Certainly, the reasonable officer would have either ensured that such consent had been given or would have obtained a warrant during the trip to the police station to procure the camera. For these reasons, then, the court is constrained to deny the defense of qualified immunity with regard to Felean.

III. CONCLUSION

For the foregoing reasons, the motion for summary judgment filed by the six police officers in their individual capacities (Docket No. 93) is hereby denied.

IT IS SO ORDERED.

SAM H. BELL
U. S. DISTRICT JUDGE

SUPREME COURT, U.S.
FILED
AUG 18 1992
OFFICE OF THE CLERK

No. 92-148

In The

Supreme Court of the United States

October Term, 1992

DAVID CALHOUN, CHRISTINE CALHOUN, RONALD DALZELL, PHILLIP RINEHARDT, and KEVIN MAY, In Their Individual Capacities,

Petitioners,

vs.

JOSEPH SENK and PATRICIA SENK,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Rex W. Post
113 St. Clair Avenue, Suite 375
Cleveland, Ohio 44114
(216) 696-2118

Attorney for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. Section 1983 provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . .

STATEMENT OF THE CASE

Petitioners have set forth an adequate procedural statement of this case. However, because their Argument is essentially factual in nature, elaboration is necessary here to correct numerous inaccuracies and omissions in the factual portion of their Statement of the Case.

In this civil rights action, which was brought pursuant to 42 U.S.C. Section 1983, the respondents, Joseph Senk and Patricia Senk allege, *inter alia*, that the five petitioner police officers used excessive force during their arrest of Mr. Senk on May 12, 1990 in violation of the

Fourth Amendment to the United States Constitution and 42 U.S.C. Section 1983.

Following limited discovery in the case, petitioners moved for summary judgment on the issue of qualified immunity. The District Court denied their motion. *See* Order, United States District Court, Northern District of Ohio, Eastern Division, Case No. 90-CV-1699, reprinted in the Appendix to Petition for Writ of Certiorari (hereinafter referred to as "Appendix") at 10a. The District Court's denial of petitioners' motion for summary judgment was affirmed by the Sixth Circuit Court of Appeals on April 22, 1992. *See* Judgment Entry, United States Court of Appeals for the Sixth Circuit, Case No. 91-3823, also reprinted in the Appendix to the Petition for Writ of Certiorari at 1a.

The facts are well supported that on Saturday, May 12, 1990 the respondents, Joseph and Patricia Senk, had been engaged in an argument that turned physical in the driveway area outside of their home during which Mrs. Senk was grabbed about the neck and collarbone. Also, and as a result of a combination of a push from her husband and slippage on the muddy driveway, Pat Senk fell into her vehicle and injured her side. Although she experienced pain and hysteria, she had no lacerations or bruises. It is clear as well that Mr. Senk had not struck her and no medical treatment was required.

Almost immediately after the brief altercation between Mr. and Mrs. Senk ended, two of the petitioner police officers arrived at the residence. The second officer arriving at the time, David Calhoun, immediately directed his attention to Joseph Senk. Upon seeing the approaching officer and reasonably believing that he was about to be placed in custody, Mr. Senk stood up with his

hands held out in front of him to be handcuffed and the officer did so. It is undisputed that Mr. Senk was completely calm and offered no resistance whatsoever as he was escorted by the officer to the police cruiser and placed in the rear seat.

Upon David Calhoun's return, petitioner Dalzell informed him and the other two petitioners who had just arrived of his decision to charge Joseph Senk with domestic violence. It was also decided that Patricia Senk was to be sent to a local hospital for examination.

About ten minutes after being placed in the cruiser, three things occurred almost simultaneously that triggered Joseph Senk's anger. First, he saw two police officers invade his home and he shouted at them repeatedly to get out. At that same time, or very close thereto, and as three other officers positioned themselves around the car in preparation for the arrest, petitioner Dalzell stuck his head inside the front door of the cruiser to tell him "to shut your ___ mouth" and that he was under arrest. Most importantly, and as those things had just occurred, he saw his wife being taken by emergency medical technicians to an ambulance on a backboard with a C-collar. Prior to that time he did not think that his wife was hurt so he was understandably panicked and very much concerned and wanted to be with her. In a fit of frustration about his confinement and inability to be with his wife, he then broke the side window of the car with his feet.

Prior to the time that the window was broken, and with the possible exception of the inappropriate manner in which Mr. Senk was informed of his arrest, there were no serious violations of proper police procedure. Beginning at the point in time that the window was broken, however, all appropriate and proper police procedure

ceased. As one eyewitness summed up the conduct of the police that was to follow: "there should be a way that these people can subdue you without killing you."

The subduing of Joseph Senk began as he exposed his head, shoulders and hands through the open window. At that point, there were four police officers immediately outside of the door who clearly could have restrained him without the use of weapons or deadly force. Mr. Senk, after all, was handcuffed, unarmed, and vastly outnumbered by four police officers; every one of which weighed at least 200 pounds or more. Moreover, every officer present was specially trained in arrest techniques and unarmed restraint.

Without making any attempt whatsoever to physically subdue him without the use of weapons or violence, and after yelling "___ damn it, Joe, you really ___ up now", petitioner David Calhoun immediately and violently struck Joe Senk on the head and forehead three times in rapid succession "with a big damn flashlight . . . one of those big things, what, four or five cell flashlights . . . ", according to a witness who was observing this conduct, unobstructed and in very good lighting conditions, some four feet away. At that point Joe fell back into the cruiser and he appeared to be "in excruciating pain" and "half out of it".

Immediately after Joseph Senk was beaten on the head with the weapon, an officer opened the cruiser door at which time one of the witnesses thought he was going to "check and see if he was dead or something". Mr. Senk looked at the time "like he was dazed or like he wasn't, you know, he wasn't sure he was with it." Contrary to what the witness thought, though, the police immediately and without pause, grabbed their suspect, pulled him out

of the car, locked his arms, one on each side, and began punching him with their fists. This went on for several minutes until one of the officers knocked his feet out from under him.

At no time during the period that he was pulled from the car until he was rendered unconscious did Joseph Senk's arms ever get free. Joseph Senk's affidavit and testimony, as well as the testimony of other witnesses, make clear that at no time during the entire sequence of events did he: threaten the life of any police officer; attempt to grab any officer's gun or gunbelt; punch or attempt to punch anyone; or try to escape.

By all accounts, the most that can be said of Mr. Senk's actions from the time that he broke the vehicle window until he was rendered unconscious was that "it might very well be a matter for resisting arrest, which is a misdemeanor, but it did not rise to the level of escape". Nor was he "fighting" where every petitioner used the term "thrashing" to describe his actions. In fact, one of the witnesses insists that he was just trying to cover up and defend himself from the beating.

After Joseph Senk was forced to the ground and held on his back by four officers while handcuffed, "this big woman came flying over there with a nightstick . . . [and] leaped on him", after which, "she threw one knee over on the cement, and she had her other knee somewhere in his chest someplace, and she had the stick holding him down, the stick was up against his throat". Her hands were 12 to 18 inches apart on the nightstick and her elbows were locked. When asked whether or not she was putting any pressure on the nightstick, the witness replied: "Well, you could hear Joe gurgling, she had all her weight – you know how you get down for a football

stance, she looked like she was in a football stance. I thought she was killing him right there."

According to Joseph Senk, he recalled that at the time before going into unconsciousness he was "Just trying to gasp for air, just trying to get under the cruiser because of being choked, and I couldn't breathe, and that was it."

These observations were further corroborated by another witness who stated that "it looked to me as if she had one knee buried in the center of his chest". When asked if she had him by the throat at that time, the witness, Michael Lucas, replied: "She had him right there without a doubt." When the police officer removed her nightstick from Mr. Senk's throat and herself from his chest, one of the witnesses remarked "You didn't hear no more from Joe . . . I thought he was dead then".

He was indeed very close to death. When the petitioners had finished with him, Joseph Senk was unconscious and in respiratory distress. Minutes later, his system went into arrest and he lapsed into a coma for more than five weeks. After more than three and one-half months in a hospital he was finally released suffering blindness, severe brain damage, loss of the use of one arm and other serious physical injuries and mental conditions. His condition has not improved significantly through the present date.

ARGUMENT

I. THE QUESTION PRESENTED FOR REVIEW DOES NOT ARISE FROM THE FACTS OF THIS CASE.

Without question, it is well settled that unspecific, self-contradictory, and/or implausible evidence, without more, is insufficient to defeat a motion for summary

judgment under Rule 56 of the Federal Rules of Civil Procedure. Contrary to the petitioners' claims, however, the record is clear that the District Court and the Court of Appeals in this case were presented with competent and probative evidence by respondents on the issues raised herein. Accordingly, the denial of their motion for summary judgment was well supported and proper in all respects. Further review by this Court is therefore unnecessary.

The petitioners begin in their argument with the contention that the testimony provided by respondents on the issues of whether Joseph Senk threatened the lives of two officers and attempted to grab their gunbelts was not genuine for two reasons. First, it is claimed that Mr. Senk was incapable of recalling his actions after an episode of post-concussion syndrome.[1] Next, it is theorized that a

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[1] Throughout the Petition, petitioners greatly exaggerate the manifestations and relevance of Joseph Senk's post-concussion syndrome. Indeed, they devote two pages in their Statement of the Case to embellished discussions about "episodes" that occurred many years before the incident that is the subject of this case. *See* Petition at 2-4. Numerous references and unsupported suppositions are also made about the condition throughout their Arguments.

The fact of the matter with respect to this syndrome and any episodes that Mr. Senk may have experienced in years past is that they are wholly irrelevant and prejudicial to the issues of this case.

The proper focus in inquiries involving the doctrine of qualified immunity is on the totality of all the facts and circumstances known to the officers at the time of the arrest. *See, e.g., Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985). Four of the five police officers admitted that they did not know Joseph Senk or anything about him prior to the arrest on May 12, 1990. The fifth stated that he only knew of Mr. Senk in high school (some

witness to the various occurrences could not have heard the threats that were supposedly made by Mr. Senk because of the commotion at the time. Both of these allegations, though, were not found to be persuasive by the two lower courts that reviewed the lengthy record.

Rule 56(e) of the Federal Rules of Civil Procedures provides, in pertinent part, as follows:

> When a motion for summary judgement is made and supported as provided in this rule, an adverse party may not rest on the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

In reviewing a motion for summary judgment, a court is required to consider the pleadings, related documents, evidence and ". . . the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Any ambiguities in the record are also to be resolved in favor of the party opposing the motion. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). The District Court correctly noted in its review that the ultimate burden, however, was with the respondents herein, Joseph and Patricia Senk, to show the existence of genuine issues of material fact and the Court of Appeals affirmed the propriety of the use of that standard. Appendix at 2a, 17a. The respondents were thus required to come forward in their opposition to the petitioners' motion with "specific facts showing that there is

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thirteen years before the incident), but that he had not seen or heard about him since.

a genuine issue for trial." Rule 56(e), Federal Rules of Civil Procedure. It was found by both courts that this burden was met.

Petitioners correctly cite the principle that "[e]vidence that is too incredible to be accepted by reasonable minds does not raise an issue of credibility to defeat a motion for summary judgment." Petition at 14, *citing Allstate Ins. Co. v. Cannon*, 644 F.Supp. 31, 33, 34 (E.D. Mich. 1986). They go on in this vein by adding that "a court is not compelled to give weight to an allegation that is incontrovertibly demonstrated to be false." *Id., citing United States v. Various Slot Machines*, 658 F.2d 697, 701 (9th Cir. 1981). However accurate these statements of the law are, they are assuredly not applicable to the issues presented.

The petitioners first argue that Joseph Senk's denials that he threatened any officer or attempted to grab their gunbelts was not genuine because he was allegedly experiencing an episode of post-concussion syndrome at the time. Therefore, the argument goes, he could not have had any recollection of the events. Such a theory, however, is contrary to the general rule that "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor". *Adickes*, 398 U.S. at 158-159. It is fundamental that the lower courts were not entitled to gauge the parties' credibility, as the petitioners would require. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

In advancing this theory about his inability to recall events at the time of the incident, petitioners rely solely on the following deposition testimony of Mr. Senk where the questions focused entirely upon his experiences with

episodes *before* being given medical treatment for the condition in 1979 or 1980:

> Q. You indicated earlier in this deposition that you at times had violent episodes that occurred, and that was the basis of your seeing Dr. Richard Schwartz, correct? That was one of the bases for you seeing Dr. Richard Schwartz?
>
> A. Yes.
>
> Q. Can you describe to me, if you remember, what occurs *immediately prior* to a violent episode?
>
> A. I have no idea.
>
> Q. Just something happens?
>
> A. That's it.
>
> (emphasis added).

It is not at all clear what counsel was seeking to elicit, but the responses certainly reveal nothing about whether Joseph Senk was able to recall the details of his arrest on May 12, 1990. Moreover, nothing more than the petitioners' supposition was offered on the issue of whether he was in fact experiencing an episode of post-concussion syndrome at the time of his arrest which was some twelve years after his industrial accident. On the contrary, the record before the Court of Appeals showed that Joseph Senk was able to accurately recall many of the details of his actions and the events that occurred throughout the course of the particular day and evening at issue.

The lower courts were correct in their review in light of the ruling that " . . . at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby, Inc.*, 477 U.S. at 249. " . . . [S]ummary judgment will not

lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. Certainly, Joseph Senk's sworn testimony is to be believed in the absence of a much stronger showing than was made by the petitioners that he was "apparently" suffering from an episode and therefore he was "apparently" unable to accurately recall the events. In such a situation, the reviewing court is to look at the plaintiffs' allegations and accept them as true. *Mitchell v. Forsyth*, 337 U.S. 541 (1949). This standard is especially applicable where a party's recollections are corroborated by an independent witness.

The petitioners next challenge the genuineness of the testimony of a witness to the events who supported Joseph Senk's version of the facts. They claim that the individual could not have heard the alleged threats due to the commotion at the time. The record before the lower courts, however, reveals that the witness, Mr. Paul Testa, was standing four feet away from the parties at the time. Surely, a jury could reasonably conclude that he would have heard Joseph Senk threaten an officer if such a threat was in fact made. After all, he heard the officer tell Senk: "___ damn it Joe, you really ___ up now. That's a brand new squad car." Mr. Testa further testified that he heard the noise, or "pops" from the flashlight against Joe Senk's head. It is entirely possible, therefore, that respondent Calhoun did not hear what he thought he heard in the "commotion".

The second issue of fact in the same sequence has to do with two of the petitioners' defenses that Joseph Senk grabbed their gunbelts and, here as well, they continue to argue that the accounts of Messrs. Senk and Testa are

implausible. The lower courts though, correctly exercised their discretion and found that the testimony was sufficiently plausible and credible to warrant a jury's consideration.

The lower courts' rulings on the issues presented are in complete accord with the Supreme Court's holding that:

> There is no requirement that the trial judge make findings of fact. The inquiry performed is the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Liberty Lobby, Inc., 477 U.S. at 250.

In Part I of their Argument the two defendants additionally claim that Mr. Senk lunged through the side window of the police cruiser and placed them in fear for their lives by grabbing their gunbelts. They maintain such positions despite their admissions that Senk's hands never touched their weapons and that their belts were grabbed, if at all, near the front and about six inches away from the guns. Further, and rather than groping to reach their guns, they each stated that Senk's grip was so tight that Calhoun had to hit him on the forearms with a flashlight and Dalzell had to punch him in the mouth to get free. Senk has testified under oath, however, that he did not grab any officer's gun or gunbelt or even attempt to do so.

At the time that Senk was said to have extended himself more than half of the way out of the cruiser

window and grab and hold onto two officers' belts, one at a time, so hard and long that they had to strike him and punch him to get free, three other persons were standing within a few feet of them in good lighting conditions. Not *one* saw any such things occur.

Even if Testa's attention was "momentarily diverted" in the time it took him to hand a wallet to someone standing next to him as petitioners claim, he would have seen something occur during all of these events if they in fact did. Moreover, David Calhoun did not even see Dalzell being grabbed by Senk. Surely then, a jury will assess the probability that at least one of all of those individuals in close proximity would have seen Joseph Senk grab and hold at least one of the officers' belts, if in fact he did. Strangely enough though, one Frank Guffin is the only person who claims that he saw an officer being grabbed around the waist. This "direct evidence", as petitioners term it, however, came from one of their co-defendants who was standing fifty feet away at the time in the dark. *See* Petition at 18.

Contrary to defendants' version, and from all indication, what happened was just as Testa and Senk testified. Just as Joseph Senk was exposed in the window of the cruiser with his hands near the door handle, Calhoun, without pause, began clubbing him violently on the head with a flashlight. The District Court also made note of the fact that even one of the other police petitioners supports this version in part where he acknowledged that Senk's hands were on the door handle instead of on someone's gunbelt. *See* Appendix at 13a-14a. Testa and the other officers did not, therefore, see Senk grab anyone's gunbelt for the simple reason that it didn't happen. It is thus

submitted that any implausibility regarding this defense of the petitioners too is in *their* version of the facts.

The third factual issue that is asserted under this heading has to do with whether Officer Calhoun struck Joseph Senk on the head with a flashlight. Contrary to what the petitioners represent, however, there is indeed a great deal of sound and credible evidence in support of the Senks' version and claims.

To begin, Joseph Senk's allegation that he was hit on the head was supported by the observations of Paul Testa who was, again, standing just four feet away at the time. Mrs. Senk too recalled in detail about her observations of her husband's condition at the hospital where she described "a mess of cuts and lumps" on his head and "a big bash over his eyebrow." The hospital records also verify her observations on this issue.

If there was any doubt as to the genuineness of the non-medical evidence, the lower courts reviewed supporting medical records evidencing a concussion and a report from a neurologist wherein he opined that Joseph Senk's severe brain damage and blindness were "due to head injury in relationship to the incident of May 12, 1990. The relationship is causal and related within a degree of medical *certainty*." (emphasis added).

In this particular argument Officer Calhoun claims that there is no genuine issue of material fact as to whether he struck Joseph Senk on the head with a flashlight. On the contrary, the courts below found and described a wealth of controverted facts from the testimony and medical evidence from which a jury can reasonably and easily conclude that Joseph Senk was violently beaten in the manner that he alleges. In such a situation, " . . . the judge must ask himself not whether he

thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented . . . The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Liberty Lobby, Inc.*, 477 U.S. at 252. Clearly, numerous and genuine issues of material fact exist from which a jury can reasonably enter a verdict for the respondents on their claims.

Finally, and not surprisingly, petitioners make only brief mention of the dispute of fact surrounding the conduct of petitioner Chris Calhoun. Given the circumstances at the time of her actions, the level of force that she employed was without question the most outrageous and excessive level of violence employed during the arrest.

Before addressing her actions it must be pointed out that if the respondents' version of facts are found to be correct, at the moment that Joseph Senk was directed to the ground outside of the cruiser he was blind, suffering brain damage, semi-lucid and in excruciating pain from the blows to his head.

Whether or not Mr. Senk's handcuffs were broken at the time as petitioners infer is immaterial. The record is clear that as he was severely disabled and in such tremendous pain, four officers held him firmly on his back while this 220 pound officer thrust her knee repeatedly into his chest as she choked him across the throat with a nightstick with all of her might until he lapsed into unconsciousness and respiratory distress. If true, and there are many sound facts to conclude that it is, this officer's

conduct can only be characterized as outrageously excessive under circumstances where absolutely *no* force was called for.

It readily appears on the face of their decisions that the District Court and the Court of Appeals considered the genuineness of the many factual issues presented for review. Contrary to petitioners' representation, the courts below both explicitly found and recited many, many facts that were direct, probative and admissible in support of respondents' claims that excessive force was employed in violation of their civil rights.

"Given the sharp conflict in the evidence", the Court of Appeals held, "only a jury can decide whether the facts are as the officers say they are." Appendix at 6a. This ruling was in conformity with the Supreme Court's standard that "[T]he plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial." *Liberty Lobby, Inc.*, 477 U.S. at 257. Accordingly, petitioners' argument that there was insufficient evidence to create genuine issues of material fact is without merit and, as a consequence, this Court should not accept this argument for review.

II. THE ALLEGATIONS AND SUPPORTING EVIDENCE PRESENTED BY RESPONDENTS WERE IN CONFORMITY WITH THE STANDARD ENUNCIATED IN *ANDERSON V. CREIGHTON*, 483 U.S. 635 (1987).

In Part II of their Argument Petitioners accurately cite the principle that the right that an official is alleged to have violated must have been "clearly established" in a

particularized and relevant sense. Petition at 21, 22. However, they insist in their argument that such a showing has not been made by respondents and, also, that because the Court of Appeals did not specifically cite cases that were analogous to the facts of this matter, and then only one that pre-dated the arrest of Joseph Senk, there was an absence of clearly established law on the use of excessive force at the time. Their contentions are obviously mistaken and do not merit the attention of this Court.[2]

Throughout the proceedings in the lower courts it was alleged in a detailed fashion that the five police officers applied levels of force on three separate occasions during the arrest of Joseph Senk that were wholly excessive under the circumstances. So much force, in fact, that he was rendered comatose for more than five weeks and permanently disabled with blindness, brain damage, loss of the use of one arm and other very serious injuries. Such extreme levels of force were also convincingly shown to have been in response to only nominal resistance, or "thrashing" as it was described by the police, on the part of the respondent during his arrest. The allegations and supporting evidence met the requirements set forth in *Anderson v. Creighton*, 483 U.S. 635 (1987) in that they were relevant and particularized.

Contrary to petitioners' claims, a review of both of the lower courts' inquiries into the qualified immunity defense as it pertains to allegations of the use of excessive force amply demonstrates that the prohibition against the

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[2] In their motion for summary judgment, petitioners did not contend that one's right to be from the use of excessive force under the Fourth Amendment was not clearly established at the time of the incident.

use of the same was clearly established law at the time of the arrest at issue, both in the Sixth Circuit and throughout the nation.

The Supreme Court in the case of *Graham v. Connor*, 490 U.S. 386 (1989), set forth the standard under which excessive force claims are to be analyzed. It was this standard that the District Court and the Court of Appeals applied to the facts in this case which resulted in the denials of petitioners' motion for summary judgment on the basis of qualified immunity, *viz.*, "whether the record contains evidence that petitioners' conduct rose to such a degree that the reasonable official would have known that what plaintiffs were doing violated J. Senk's clearly established right to be free from the use of excessive force." Appendix at 6a, 20a.

It has long been established that the use of excessive force violated some constitutional right, but until *Graham*, precisely what right was violated had not been clarified by the Supreme Court. The *Graham* Court's conclusion that the Fourth Amendment governs all uses of force against persons at liberty follows from its decision in *Tennessee v. Garner*, 471 U.S. 1 (1985). The *Garner* decision held that the use of deadly force to apprehend a fleeing suspect who did not appear to be armed or otherwise dangerous violated the suspect's rights under the Fourth Amendment in that such use of force constituted an unreasonable seizure of his person. In *Graham* the Court simply extended that proposition beyond deadly force cases to *all* excessive force cases where the victim is at liberty. That standard was properly cited and relied upon by the Court of Appeals in its decision. *See* Appendix at 6a. It is therefore clear that the court was correct in finding that Joseph Senk had a clearly established right on the evening of his arrest to be free from the use of

excessive force by the police officers under the Fourth Amendment to the Constitution. Appendix at 6a, 7a; *See also* Appendix at 20a.

The Supreme Court also settled in *Graham* the question of what analysis should be employed to determine whether a given level of force is unconstitutionally excessive. Noting that "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application . . . ", it provided the following instruction:

> . . . its proper application requires careful attention to the facts and circumstances of each particular case including the severity of the crime, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Graham, 490 U.S. at 396

In light of these principles, the lower courts in this case thoroughly evaluated all the testimony and exhibits that were presented by the parties for review on the issue of qualified immunity. Indeed, the District Court devoted nearly six full pages in the background section of its Order to a discussion of the versions of fact and the Court of Appeals devoted an additional four. *See* Appendix at 11a-16a and 2a-6a, respectively. It is therefore apparent that both courts were mindful of their duty to pay careful attention to the particularized and relevant facts and circumstances of the case and the same were given appropriate consideration in the analyses.

Following the required review of the facts and circumstances then, the lower courts were next obligated under the *Graham* standard to ascertain whether the conduct of the officers was objectively reasonable. *See*

Graham v. Connor, 490 U.S. 386, 396 (1989); Appendix at 6a, 22a.

In determining whether the force used in a given instance was reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the suspect's Fourth Amendment interests against the countervailing governmental interests at stake. When the governmental interests in using force are weak or nonexistent though, as here, even a slight injury may be sufficient to establish a Fourth Amendment violation. *See Molton v. City of Cleveland*, 839 F.2d 240 (6th Cir. 1988); *Lewis v. Downs*, 774 F.2d 711 (6th Cir. 1985).

The *Graham* Court further stated that the reasonableness of the conduct must be judged from the perspective of a reasonable police officer on the scene, not based on hindsight, and should take into account the fact that police officers are often forced to make split-second judgments about the amount of force that is necessary in a particular situation. *Graham*, 490 U.S. at 396.

Contrary to the petitioners' characterizations, the review in this matter was very much unlike that of the Eighth Circuit that was overturned in the case of *Anderson v. Creighton*, 483 U.S. 635 (1987). In *Creighton* the Court held that the Court of Appeals misapplied the standard for determining qualified immunity because its discussion "consisted of little more than an assertion that a general right *Anderson* was alleged to have violated . . . was clearly established." The Court went on to point out that the lower court refused to consider the argument that it was not clearly established that the circumstances surrounding the warrantless search did not constitute probable cause and exigent circumstances. *Creighton*, 483 U.S. at 640-41.

Unlike the Eighth Circuit Court of Appeals decision in the *Creighton* case, the lower courts in this case did in fact consider Petitioners' argument that their alleged actions were not clearly established at the time of the incident. What they ignore in their argument is the point that was made by the courts below that before a determination of objective reasonableness can be made about the conduct of the police, the issue of *what* force was used must first be settled with some degree of certainty. Even then, something definitive about the circumstances must be resolved as well before any conclusions can be drawn as to *why* force was used. Then, and only then, can a determination be made as to whether the amount of force was objectively reasonable.

In their rulings, the District Court and the Court of Appeals concluded after the required review of the facts that they could not judicially determine whether the conduct of the police in the arrest of Joseph Senk was objectively reasonable because of the conflicting versions. *See* Appendix at 7a, 23a. These two rulings were in accord with the Supreme Court's holding previously cited that "There is no requirement that the trial judge make findings of fact. The inquiry performed is the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Liberty Lobby, Inc.*, 477 U.S. at 250.

After even a cursory review of the record it becomes apparent that there are many, many genuine and relevant factual disputes about what occurred during the course of the arrest and detention of Joseph Senk on May 12, 1990

that relegate against the making of a judicial determination of reasonableness. To be sure, the totality of the circumstances reasonably known to the police immediately prior to the arrest of Mr. Senk are in dispute and unsettled as well.

With respect to the conduct of petitioner David Calhoun alone, there is a significant controversy as to what provoked the force that he used on Joseph Senk while Senk was in the police cruiser. The parties further disagree as to whether the suspect was handcuffed at the time. Petitioner Calhoun, of course, denies that he clubbed the respondent repeatedly and violently on the head as he is accused of doing. Calhoun allows only that he hit Senk on the arm with his flashlight. Thus, genuine and material questions remain unanswered about exactly what force was used on Joseph Senk at the time that he was in the cruiser.

Even if the issues were settled as to the level of force and where it was applied by officer Calhoun, an additional issue of fact is widely in dispute about what provoked such force. Petitioners Calhoun and Dalzell each claim that their lives were threatened by the respondent. Alternatively, Joseph Senk adamantly denies that he threatened their lives in any manner and his testimony was corroborated by a witness.

The District Court and the Court of Appeals were also unable to make a determination about whether it was objectively unreasonable, as respondents claim, for four police officers to pull the handcuffed suspect through the door of the cruiser, hold him firmly and punch him for several minutes where his only resistance was described by the police as "thrashing". The version

offered by the police is that Mr. Senk was never on his feet as he was immediately directed to the ground from the broken window of the cruiser. They offer no explanation for the fact that his chest was not shredded with cuts from the broken glass, though. Nor do they admit that his chest was bruised from punches.

Finally, no determination was possible concerning the claimed unreasonableness of the events that occurred on the ground during the arrest. If the Court were to choose and adopt respondents' version that the blows from the flashlight to Joseph Senk's head while in the cruiser were so severe that he not only sustained brain damage, but that his optic nerves were destroyed as well, it follows that at the time that he was later held on his back by four officers he was blind, in severe pain, semi-lucid and suffering brain damage. Query whether any court under any standard could deem it then reasonable for a 220 pound officer to thrust her knee repeatedly into the person's chest and choke him in this condition with a nightstick until he became unconscious, as respondents' evidence establishes. It should be added parenthetically that officer Chris Calhoun not only denies choking him, she also refuses to admit that she even *had* a nightstick on her person during the incident.

The police, on the other hand, refuse to acknowledge any of the foregoing facts and admit only that "no petitioner used a gun or knife against Joseph Senk." Petition at 25. Because of that, their argument goes, "*Tennessee v. Garner* does not constitute 'clearly established law' supporting any theory that petitioners used constitutionally excessive force against respondent Senk." *Id.*

To be sure, the respondents recognize that not every push or shove, no matter how unnecessary it may later

seem, violates the Fourth Amendment. *Graham*, 490 U.S. at 396. Unquestionably, a police officer's right to make an arrest carries with it the right to use some degree of physical coercion. *Id.*

In this case, however, there was a literal wealth of competent testimony and medical evidence in the record before the District Court and the Court of Appeals to establish that the petitioners employed levels of force on three separate occasions that were wholly excessive and unreasonable under the circumstance where little, if any, physical force was in fact necessary. Practically every material fact asserted by respondents was denied by petitioners. Indeed, there are so many genuine issues of material facts in the record that the court aptly termed the differences as "radically opposed". Appendix at 11a.

Returning to the standard of review that is required after assessing the facts and circumstances of the case, it is stated in *Graham* that the court must next attempt to ascertain whether the conduct of the officers was objectively reasonable. *See Graham*, 490 U.S. at 396; Appendix at 6a, 22a. Because neither of the lower courts in this case were able to reconcile or choose between the two diametrically opposed versions of fact to make an objective determination of what a reasonable officer would have done in similar circumstances, they properly concluded that the case must go to trial. This decision was explained by the Court of Appeals as follows:

> In *Yates v. City of Cleveland*, 941 F.2d 444 (6th Cir. 1991), we held that the standard for determining qualified immunity in excessive force cases is the general standard set forth in *Anderson v. Creighton*, 483 U.S. 635 (1987): "whether an objectively reasonable officer" would believe

> that the conduct in question was lawful. *Yates*, 941 F.2d at 445-47. If the level of force used by the officers was necessary to remove a threat to their safety, for example, or was necessary to avoid the use of lethal force, a grant of qualified immunity would be appropriate. *See, Russo v. City of Cincinnati*, 953 F.2d 1036, 1044-45 (6th Cir. 1992); *Brandenburg v. Cureton*, 882 F.2d 211, 215 (6th Cir. 1989). Immunity would doubtless be appropriate here if it were undisputed that the facts were as claimed by the officers. If the Senks' version of facts is correct, however, the officers who are accused of using excessive force would clearly not be entitled to qualified immunity. In this case, as in *Brandenburg*, 882 F.2d at 216, "the legal question of qualified immunity is completely dependent upon which view of the facts is accepted by the jury." Summary judgment based on qualified immunity is therefore inappropriate. *Yates*, 941 F.2d at 447.

The District Court made a similar finding. *See* Appendix at 22a-23a. It was in this second level of review, therefore, that the courts below found that such determinations could not be made because of the "sharp conflict in the evidence". Appendix at 6a.

In summary, it is conclusive that not only did both of the courts below follow the correct approach in evaluating the petitioners' claim of entitlement to the doctrine of qualified immunity, they also correctly found that Joseph Senk had a clearly established constitutional right on the evening of his arrest to be free from the use of excessive force by the officers. And, contrary to the petitioners' claims otherwise, such findings were well supported with allegations and facts that were particularized and relevant to those issues. Accordingly, neither the facts of this

case nor the arguments raised in Part II of their Argument give rise to the allegedly unique issues that petitioners propose for review by this Court.

III. THE STANDARDS SET FORTH IN THE CASES CITED BY PETITIONERS DO NOT APPLY TO THE FACTS OF THIS CASE.

Petitioners begin Part III of their Argument by asserting that police officers should be afforded the protection of qualified immunity in instances where the level of force was reasonable, albeit mistakenly used. In support, they rely on the case of *Hunter v. Bryant*, 112 S.Ct. 534 (1991). For the reasons that follow, however, it is clear that the decision in *Hunter* is not applicable to the facts of this case.

First, in *Hunter* the facts and circumstances were well settled. As a result, the Supreme Court was able to judicially determine that although probable cause for the arrest was lacking, the officers' conduct was nevertheless reasonable under the circumstances.

Unlike the *Hunter* case, however, virtually all of the material facts and circumstances surrounding the arrest of Joseph Senk in the instant case are widely in dispute. Indeed, the officers in this case refuse to acknowledge that they used anything but minimal force during the course of the arrest. Moreover, they insist that two of the officers' lives were threatened. Respondents, on the other hand, deny that any threats were made and they further maintain that Joseph Senk was severely beaten and choked following only minimal resistance.

Further, and contrary to the decision of the Ninth Circuit in the *Hunter* case that was overturned, the Sixth

Circuit in the case at bar explicitly recognized that immunity should ordinarily be decided by the court and it also applied the correct rule in its determination of the issue; "the standard for determining qualified immunity in excessive force case is the general standard set out in *Anderson v. Creighton*, 483 U.S. 635 (1987): 'whether an objectively reasonable officer' would believe that the conduct in question was lawful." Appendix at 7a.

In the final analysis in the present case though, the Sixth Circuit Court of Appeals found after a thorough review of the record that is was judicially unable to make a determination of reasonableness because of the "sharp conflict in the evidence". Appendix at 6a. On that basis it held that "only a jury can decide whether the facts are as the officers say they are." *Id.* The ruling under such circumstances was in accord with the Supreme Court's statement that "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge, whether he is ruling on a motion for summary judgment or for a directed verdict." *Liberty Lobby, Inc.*, 477 U.S. at 255.

It follows from the *Hunter* decision that before a reviewing court can make determinations as to whether the decisions of officers were reasonable and whether mistakes were committed, it must first have reasonably well settled facts available from which to make such assessments. Where the plaintiffs' allegations articulate a violation of clearly established law and there are genuine issues of disputed and material facts, a jury must resolve the question. *See Mitchell*, 472 U.S. 511 (1985). Clearly, the "radically opposed versions of the facts in this case do

not lend themselves to the type of analysis that petitioners propose. Appendix at 11a.

It is next claimed by petitioners under this heading that no clearly established law at the time of the events had defined their conduct with respect to the use of nondeadly force. Petition at 28. This contention, of course, has been addressed earlier herein at length but the principle set forth in *Graham* requires repetition that "*all* claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness standard . . . " *Graham*, 490 U.S. at 395 (emphasis in original). Unquestionably, Joseph Senk had a clearly established right on the evening of his arrest to be free from the use of excessive force by the police officers under the Fourth Amendment. The petitioners' assertion to the contrary is therefore patently erroneous.

Finally in their argument that relies on the *Hunter* case, petitioners restate the undisputed standard that courts, and not juries, are to decide the question of objective reasonableness whenever possible. The petitioners do not, however, suggest that the courts below failed to try to comply with the standard. In fact, the District Court explicitly stated in its companion order that recent authority has established that whether a government official is possessed of qualified immunity from Section 1983 suits is a question of law for the court to resolve in the first instance. *See also* Appendix at 20a. The Court of Appeals concurred in this statement of the law and too endeavored to resolve that very question.

In yet another argument under this heading, petitioners alternatively encourage the Court to apply the

approach set forth in *Siegert v. Gilley*, 111 S.Ct. 1789 (1991), to the facts of this case and rule that respondents have failed to allege constitutional violation of their rights. As with the *Hunter* case, the facts in *Siegert* as well simply bear no relationship to the issues here.

Siegert, of course, was an action brought by a former government employee against his previous supervisor for allegedly writing defamatory matter about his job performance. As a result of such conduct, Siegert claimed that he was deprived of his constitutionally protected liberty interest without due process of law. The Supreme Court held that Siegert "failed to satisfy the first inquiry in the examination of such a claim; he failed to allege the violation of a clearly established constitutional right." *Id.* at 1793. Even if his allegations were accepted as true, "[he] did not state a claim for violation of any rights secured to him under the United States Constitution." *Id.* at 1791. In contrast, the respondents herein have properly alleged and documented violations of the constitutional right to be free from the use of excessive government force under the Fourth Amendment to the United States Constitution.

Although it is claimed by petitioners that respondents cannot establish a constitutional violation under either version of facts, it is clear from the vast record that they are mistaken, as both the District Court and the Court of Appeals specifically found after a comprehensive review. After reciting the different versions of fact and the applicable standards, the Court of Appeals concluded by stating that "If Senks' version of the facts is correct, however, the officers who are accused of using excessive force would clearly not be entitled to qualified immunity." Appendix at 7a.

It is readily apparent that the petitioners' various arguments under this heading do not require the Court's

review. Indeed, the two cases relied upon bear no relationship to the facts or issues of this case. Moreover, their allegations that the Senks failed to allege violations of established constitutional rights and that the use of excessive force by police officers was not clearly established are surely without merit.

CONCLUSION

Petitioners brought this action in an effort to obtain protection under the doctrine of qualified immunity for their actions during the arrest of respondent Joseph Senk on May 12, 1990. It was shown that during the course of the arrest Mr. Senk was seriously and permanently injured as a direct and proximate result of the excessive force administered in response to minimal resistance.

Neither the facts of this case nor the previous legal arguments raised by petitioners and considered by the lower courts give rise to the allegedly unique issues petitioners propose for review by this Court.

Because the petitioners' appeal does not raise issues requiring this Court's review, it is respectfully submitted that the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

Rex W. Post
113 St. Clair Avenue, Suite 375
Cleveland, Ohio 44114
(216) 696-2118

Attorney for Respondents,
Joseph E. Senk and Patricia A. Senk